

**UNITED STATES
OF
AMERICA**

**D-025
Defense Motion to Compel Discovery
(Eyewitnesses)**

9 May 2008

v

OMAR AHMED KHADR
a/k/a “Akhbar Farhad”
a/k/a “Akhbar Farnad”
a/k/a “Ahmed Muhammed Khahi”

Determination and Ruling

1. The defense filed this motion on 19 February 2008 – the commission takes note that the date on the motion of 15 January 2008 is incorrect. Intervening emails from the prosecution, defense, and military judge resulted in a telephonic RMC 802 conference on 21 February 2008. The prosecution did not file a formal response to the motion; in lieu of responding, it sent the defense an email offering partial compliance forthcoming (28 February 2008). The motion was discussed at an RMC 802 conference on 12 March, on the record on 13 March, and at an RMC 802 conference on 13 March. The government continued to provide information. The motion was discussed at an RMC 802 conference on 10 April and on the record on 11 April. The government continued to attempt to comply. At an RMC 802 conference on 7 May 2008, the government detailed what it had done to comply. On the record on 8 May, the defense indicated that it was satisfied that the government had, in good faith, complied to the best of its ability. In the Motion Status Summary, distributed to the parties on 9 May 2008, D-025 carried the notation : “Action complete, If DC want more, they will make a new request. MJ will file a determination in the matter.” Other than the original motion filed by the defense, no other pleadings concerning this motion were filed by either party.

2. Documents discussed in paragraph 1 will be contained in the Appellate Exhibit which contains this motion.

3. The commission determines that the government has satisfied the requirements of RMC 701 in connection with this motion. Any further requests by the defense in connection with the subject of this motion will be made in the context of a new discovery request.

4. The commission rules that action by the parties and the commission on this motion is now Final.

Peter E. Brownback III
COL, JA, USA
Military Judge

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

Defense Motion
To Compel Discovery
(Eyewitnesses)

15 January 2008

1. **Timeliness:** This motion is filed within the timeframe established by the Military Commission Trial Judiciary Rules of Court.
2. **Relief Sought:** The defense respectfully requests that this Commission order the government to produce the requested discovery, namely the identity and most recent contact information for all eyewitnesses to the events forming the basis for the charges against Mr. Khadr
3. **Overview:** The Defense seeks production of the names and most recent contact information of all eye witnesses to the events that led to Mr. Khadr's arrest and the instant charges against him. The statute and regulations governing this Commission, as well U.S. constitutional precedent and international law, require production of discovery relating to eyewitnesses. The Government has withheld the identity and contact information for as many as approximately forty-three eyewitnesses. The Defense does not know the identity of the individuals present at the events in question, and the government's refusal to produce the requested information impedes the defense's right to "have a reasonable opportunity to obtain witnesses and other evidence" and to examine evidence "material to the preparation of the defense". *See* 10 U.S.C. § 949j; Rule for Military Commission (R.M.C.) 701(c)(1). The government's denial of this discovery request also violates its obligations under R.M.C. 701(j) not to "unreasonably impede the access of another party to a witness or evidence." The Defense therefore moves for an order from the commission to compel the Government to disclose the identity of and contact information for all eyewitnesses to the firefight that led to Mr. Khadr's arrest.
4. **Burden of Proof:** The Defense bears the burden of establishing, by a preponderance of the evidence, that it is entitled to the requested relief. The Defense, however, need not show by a preponderance of the evidence that the requested discovery is material. *See generally, Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555 (1995) (On review, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.").
5. **Facts:**
 - a. The government has provided the Defense with the sworn statements or interview summaries of thirty-two eyewitnesses to the firefight that resulted in the charges at issue here.

Major Groharing stated in an R.M.C. 802 conference held on 9 November 2007 that there were fifty to seventy-five witnesses at the firefight.

b. A disclosed eyewitness interview summary indicates that at least one witness provided the Government with contact information current as of December 2005 for eyewitnesses to the events in question. Fields Report of Investigative Activity (RIA) of 6 Dec 05 at 3 (Attachment A).¹

c. The disclosed eyewitness statements and interview summaries contain inconsistencies.²

e. On 09 November 2007, the defense submitted to the government a request for discovery that sought, among other items, the following: “A list of all eyewitnesses to the events forming the basis for the charges.” (Def. Discovery Req. of 9 Nov 07, ¶ 3(f)) (Attachment D).

f. Trial counsel responded that:

The government has provided the Defense with statements from numerous individuals present at the raid resulting in the capture of the accused. The government will assist the Defense with locating a particular individual upon a Defense showing how they expect the witness testimony will be material to the preparation of the Defense.

(Govt Resp. of 4 Dec 07 to Def. Discovery Req., ¶ 3(f)) (Attachment E).

¹ Major Groharing or other members of the prosecution may have personal knowledge of the identity of the undisclosed witnesses as Major Groharing or another member of the Prosecution was present at sixteen of the twenty-five interviews for which summaries were released to the Defense. *See, e.g.*, Report of Investigative Activity of 6 Dec 05 at 1 (Attachment A).

² For example, two witnesses who state they were positioned near the front door of the compound where the firefight occurred have differing accounts as to whether, at the outset of the fight, *grenades* were thrown *from* inside the compound, or whether *a grenade* or *one or two* grenades were thrown *into* the compound. Compare Soldier #4 RIA of 7 Dec 05 at 2 (grenades were thrown out of the compound) (Attachment B) with Whalen RIA of 7 Nov 05 at 1 (one or two grenades were thrown into the compound) (Attachment C) and Fields RIA of 6 Dec 2005 at 1 (a grenade was thrown into the compound) (Attachment A). Other witness statements that support one or the other version, don’t mention that issue at all, or state that a grenade was thrown into *and* several were thrown from inside the compound. The statements also differ as to the number of U.S. soldiers wounded at the scene before Combat Air Support was called in.

6. Argument:

a. The M.C.A., R.M.C., Regulations for Trial by Military Commission, the Due Process Clause and International Law Require Disclosure of the Requested Information

(1) Disclosure is Required Under the Statute, Rules and Regulations Governing Military Commissions

(i) The M.C.A. states that “Defense counsel in a military commission under this chapter shall have a reasonable opportunity to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense.” *See* 10 U.S.C. § 949j. The Regulation echoes the statute. *See* Regulation for Trial by Military Commissions 17-2(a) (“Pursuant to 10 U.S.C. § 949j, the defense counsel in a military commission shall have a reasonable opportunity to obtain witnesses and other evidence as provided by R.M.C. 701-703, and Mil. Comm. R. Evid. 505.”).

(ii) Rule 701(c)(1) of the Rules of the Military Commission (“R.M.C.”) requires the government to permit the defense to examine documents and things “within the possession, custody, or control of the Government, the existence of which is known or by the exercise of due diligence may become known to trial counsel, and *which are material to the preparation of the defense* or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial” (emphasis added). The Discussion accompanying R.M.C. 701(c) instructs the military commission judges to look to *United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989), which applied Federal Rule of Criminal Procedure 16³ addressing discovery, for the proper materiality standard. In *Yunis*, the court ruled that the defendant was entitled to “information [that] is at least ‘helpful to the defense of [the] accused.’” *Id.* at 623 (quoting *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957)); *see also United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1993) (“materiality standard is not a heavy burden”) (internal quotations omitted); *United States v. Gaddis*, 877 F.2d 605, 611 (7th Cir.1989) (defining material evidence as evidence that would “significantly help [] in ‘uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment and rebuttal’”) (quoting *United States v. Felt*, 491 F.Supp. 179, 186 (D.D.C.1979)). Thus, the materiality standard set forth in R.M.C. 701(c) requires the prosecution to turn over any information that is “at least helpful to the defense.” In addition, R.M.C. 701(e)(1) requires the government to disclose “the existence of evidence known to the trial counsel which reasonably tends to ... [n]egate the guilt of the accused of an offense charged.”

(iii) As discussed in more detail in part (b) below, eyewitness testimony is evidence that can assist in impeaching or rebutting aspects of the Government’s case, and is therefore material. *See United States v. Karake*, 281 F.Supp.2d 302, 309 (D.D.C. 2003) (“[W]hen

³ The relevant portion of Federal Rule of Criminal Procedure 16 is nearly identical to R.M.C. 701(c)(1). It states: “Upon a defendant’s request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government’s possession, custody, or control and: (i) the item is material to preparing the defense.” Fed. R. Crim. Proc. 16(a)(1)(E)(i).

someone has witnessed the offense, disclosure of his or her identity ‘will almost always be material to the defense.’”) (quoting *Harris v. Taylor*, 250 F.3d 613, 617 (8th Cir. 2001)). Thus, it must be disclosed under both R.M.C. 701(c)(1) and R.M.C. 701(e)(1).

(2) Disclosure is required under the Due Process Clause

(i) The disclosure requirement under the R.M.C. 701(c) echoes a fundamental principle of U.S. law: The government’s failure to disclose “evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment” *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The government’s duty to disclose such evidence encompasses exculpatory evidence, including impeachment evidence. *United States v. Bagley*, 473 U.S. 667, 676 (1985); *United States v. Mahoney*, 58 M.J. 346, 349 (C.A.A.F. 2003) (characterizing impeachment evidence as exculpatory evidence). Such evidence is “material” “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Id.* at 682. “The message of *Brady* and its progeny is that a trial is not a mere ‘sporting event’; it is a quest for truth in which the prosecutor, by virtue of his office, must seek truth even as he seeks victory.” *Monroe v. Blackburn*, 476 U.S. 1145, 1148 (1986); *see also Bagley*, 473 U.S. at 675 (“The *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur”).

(ii) The MCA makes *Brady*, at least with respect to exculpatory evidence, applicable to military commissions. *See* 10 U.S.C. § 949j(d)(2). Section 949j(d)(2) of the MCA states that the prosecution must disclose exculpatory evidence that it “would be required to disclose in a trial by general court-martial.” *Brady* governs disclosure of exculpatory evidence in general courts-martial. *Mahoney*, 58 M.J. at 349. Therefore, by virtue of MCA § 949j(d)(2), *Brady* applies to military commissions.

(3) Disclosure is Required Under International Law

(i) The Military Commissions Act (M.C.A.) and the Manual for Military Commissions (M.M.C.) incorporate the judicial safeguards of Common Article 3 of the Geneva Conventions. *See* 10 U.S.C. § 948(b)(f) (“A military commission established under this chapter is a regularly constituted court, affording all the necessary ‘judicial guarantees which are recognized as indispensable by civilized peoples’ for purposes of common Article 3 of the Geneva Conventions.”)⁴; R.M.C., Preamble (stating that the Manual for Military Commissions

⁴ Whether military commissions, in fact, comply with common article 3 is ultimately a judicial question that Congress does not have the power to answer. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the *judicial department* to say what the law is.”) (emphasis added). Any congressional attempt to legislative an answer to such a judicial question violates the bedrock separation of powers principle and has no legal effect. *See id.* at 176-77 (“The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.”). Because a statute should be construed to avoid constitutional problems unless doing so would be “plainly contrary” to the intent of the legislature, *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *see also Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936), the only reasonable interpretation is that § 948b(f) is that it requires military commissions to comply with common article 3.

“provides procedural and evidentiary rules that [. . .] extend to the accused all the ‘necessary judicial guarantees’ as required by Common Article 3.”) They must, therefore, be read in light of Common Article 3 and international law surrounding that provision.

(ii) The Geneva Convention Relative to the Treatment of Prisoners of War prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” *See* Geneva Convention, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, Common Article 3. The judicial safeguards required by Common Article 3 are delineated in article 75 of Protocol I to the Geneva Conventions of 1949.⁵ Article 75(4)(g) provides that, “anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf *under the same conditions as witnesses against him.*”⁶ (Emphasis added).

(iii) Read in light of international law principles, precedents applying the U.S. Constitution, and the rules governing this Commission, the Government’s denial of the Defense request for eyewitnesses in this case ignores fundamental concepts of fairness and places in question the integrity of these proceedings.

b. Eyewitnesses Testimony is Potentially Exculpatory or Impeaching Evidence That Must be Disclosed

(1) It is a fundamental notion of American due process – and one that Congress made applicable to military commissions through MCA § 949j(d)(2), *see* discussion *supra* para. 6(a)(2)(ii) – that the Government must produce in discovery evidence favorable to the accused when that evidence is material to guilt. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). It is also well established that a *Brady* violation arises “where the Government fails to disclose impeachment evidence that could have been used to impugn the credibility of the Government’s ‘key witness,’ *see Giglio v. United States*, 405 U.S. 150, 154-55, 92 S.Ct. 763 (1972), or that could have ‘significantly weakened’ key eyewitness testimony. *Kyles*, 514 U.S. at 441, 453, 115 S.Ct. 1555.” *Conley v. United States*, 415 F.3d 183, 189 (1st Cir. 2005).

⁵ *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 75, 1125 U.N.T.S. 3, *entered into force* Dec. 7, 1978 [hereinafter Additional Protocol]. The Protocol has not been ratified by the United States, but the U.S. government has acknowledged that Article 75 is customary international law. *See Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2797 (2006) (stating that the government “regard[s] the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled”). *See also* Memorandum from W. Hays Parks, Chief, International Law Branch, DAJA-IA, et. al., to Mr. John H. McNeill, Assistant General Counsel (International), OSD (8 May 1986) (stating art. 75 of Additional Protocol I is customary international law). The Supreme Court has also relied on the Additional Protocol in construing the meaning of Common Article 3 of the Geneva Conventions as applied to military commissions. *See Hamdan*, 126 S.Ct. at 2796.

⁶ The ICTY and the ICTR similarly provide “minimum guarantees” for the accused “to examine, or have examined, the witnesses against [the accused] and to obtain the attendance and examination of witnesses on [behalf of the accused] under the same conditions as witnesses against [the accused].” ICTY Statute, *supra* note 8, art. 21(4)(e); ICTR Statute, *supra* note 7, art. 20(4).

(2) Eyewitness identification is generally recognized as a field wrought with complications. *See, e.g., Watkins v. Sowders*, 449 U.S. 341, 349-51 (1981) (Brennan, J., dissenting) (noting that eyewitness identification evidence has “extraordinary impact,” and detailing Supreme Court’s record of recognizing “the inherently suspect qualities” of such evidence.) Eyewitnesses to events do not necessarily recall the same information, and may witness entirely different aspects of an event. The perceived reliability of eyewitness testimony is the subject of general controversy and challenges at trial.⁷ *See United States v. Mathis*, 264 F.3d 321, 333-43 (3d Cir. 2001) (evaluating eyewitness issues as area of expertise and reversing trial court denial of expert on eyewitness observation); *United States v. Brown*, 49 M.J. 448 (C.A.A.F. 1998) (discussing eyewitness testimony in context of admissibility of expert testimony about eyewitness evidence). Numerous courts, including the U.S. court-martial system, have developed specific jury instructions to guide juries in the use of eyewitness evidence. *See United States v. Telfaire*, 469 F.2d 552, 558-59 (D.C. Cir. 1972) (developing and requiring use of jury instruction to govern eyewitness evidence); *see also United States v. McLaurin*, 22 M.J. 310, 312 (C.M.A.1986) (recommending use of jury instruction to address eyewitness testimony, as adopted in *Telfaire*); *United States v. Montebalno*, 605 F.2d 56 (2d Cir. 1979) (recommending adoption of *Telfaire* rule); *United States v. Hodges*, 515 F.2d 650 (7th Cir. 1975) (adopting *Telfaire* policy of requiring eyewitness jury instruction); *United States v. Holley*, 503 F.2d 273 (4th Cir. 1974) (same); Military Judge’s Benchbook (2003 ed.), § 7-7-2 (Military Jury Instruction regarding “Eyewitness identification and interracial identification”). And Supreme Court precedent has consistently guarded the jury from hearing unreliable eyewitness testimony. *See Watkins*, 449 U.S. at 352 (Brennan, J. dissenting) (outlining Supreme Court precedent limiting use of eyewitness evidence).

(3) Eyewitness evidence is invariably potential *Brady* evidence: one eyewitness may inculcate an individual, while another eyewitness’ perspective may provide exculpatory information; an eyewitness may contradict discrete but critical facts offered by another witness (for example in describing an alleged perpetrator); or, an eyewitness may fully challenge another’s testimony. It is entirely appropriate, therefore, to request in discovery all eyewitnesses, particularly where the Government has made clear it will introduce in evidence the testimony of eyewitnesses.⁸ Failure to provide access to all eyewitnesses *ab initio* deprives the Defense of a fair trial.⁹

⁷ Indeed, one eyewitness [REDACTED], had three versions of what occurred immediately after the grenade was allegedly thrown. On 27 August 2002, [REDACTED] wrote an after action report stating that the person who allegedly threw a grenade that killed Sgt Speer was shot by US Forces but did not die. After Action Report of 27 July 2002, at 00766-000586 (Attachment F). The next day, [REDACTED] prepared another report. This time he stated the person who allegedly threw a grenade that killed Sgt Speer was killed by US Forces. Memo re Operation to Postively Identify And Capture Suspected Bomb Maker in the Vicinity of Khost, Afghanistan of 28 Jul 02, at 00766-001768 (Attachment G). Another version of this report does not indicate whether the person who allegedly threw the grenade that killed Sgt Speer was dead or alive after being shot by US Forces. Memo re Operation to Postively Identify And Capture Suspected Bomb Maker in the Vicinity of Khost, Afghanistan of 28 Jul 02, at 00766-001655 (Attachment H).

⁸ The Defense notes that a request for favorable information is not necessary in view of the government’s established disclosure obligations that require the release of discovery where impeachment or exculpatory evidence is at issue. *See Kyles v. Whitley*, 514 U.S. 419, 433, 115 S.Ct. 1555 (1995) (analyzing *Brady*

(4) Here, there are dozens of eyewitnesses to the central event at issue, namely the firefight that resulted in Mr. Khadr's arrest. The Government is withholding the names and contact information from as many as forty-three eyewitnesses. Considering the plethora of case law addressing the complications involved with eyewitness testimony (as noted above), coupled with the fact that the government is selectively calling certain eyewitnesses to testify at trial, the Defense's request for discovery regarding remaining eyewitnesses is patently material. *Cf. Strickler*, 537 U.S. at 293 ("We recognize the importance of eye-witness testimony."); *Watkins*, 449 U.S. at 352 (Brennan, J. dissenting) ("much eyewitness identification evidence has a powerful impact on juries."). The statements the Defense has received contain conflicting and different observations, and indicate these witnesses were not all in the same location with the same vantage point of events. The Defense therefore must be afforded the opportunity to interview every eyewitness to determine whether any favorable evidence is available. In light of the particularly subjective nature of eyewitness information, obstructing the Defense from interviewing every eyewitness will ensure that the Defense cannot adequately prepare for this trial, and will thereby undermine confidence in any eventual result. *Cf. Kyles*, 514 U.S. at 434 (defining fair trial "as a trial resulting in a verdict worthy of confidence."); *Strickler v. Greene*, 527 U.S. 263, 290 (1999) (same).

c. Conclusion

(1) The Supreme court has said "that the United States Attorney is 'the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" *Strickler*, 537 U.S. at 281 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). When the prosecution reserves to itself the determination of what evidence ought be considered, it disregards its duty to seek justice, and usurps the role of the court, defense counsel and the trier of fact. *Cf. Brady*, 373 U.S. at 87-88, n. 2. The integrity of these proceedings will be fatally undermined if the defense is not afforded the opportunity to independently investigate the factual allegations at issue in the case. At a minimum, this requires that the defense be allowed to know the identities of individuals who witnessed and/or participated in the 27 July 2002 firefight. The Commission should therefore grant the requested relief.

and affirming that violation of Government's disclosure obligations is implicated even where the Defense never makes a request for favorable evidence). The Defense reminds the Government that its discovery obligation is on-going. *See* R.M.C. 701(a)(5).

⁹ As the military judge is aware, just before the arraignment in this case that was held on 8 November 2008, the Government revealed that it had inadvertently discovered that one of the eyewitnesses not previously disclosed to the defense possessed potentially exculpatory information. Had the Government not inadvertently discovered this evidence, the defense would never have known of the witness's existence, let alone the information he possessed.

Disclosure of all eyewitnesses is particularly important here, where "other government agencies" told the prosecutors in the Office of Military Commissions that any exculpatory information would be withheld from the prosecutors. [REDACTED] email of 15 Mar 04 (Attachment I) ("In our meeting with OGA, they told us that the exculpatory information, if it existed, would be in the 10% that we will not get with our agreed upon searches).

7. **Oral Argument:** The Defense requests oral argument as it is entitled to pursuant to R.M.C. 905(h), which provides that “Upon request, either party is entitled to an R.M.C. 803 session to present oral argument or have evidentiary hearing concerning the disposition of written motions.” Oral argument will allow for thorough consideration of the issues raised by this motion.

8. **Witnesses:** The Defense does not anticipate the need to call witnesses in connection with this motion, but reserves the right to do so should the Prosecution’s response raise issues requiring rebuttal testimony.

9. **Conference:** The Defense has conferred with the Prosecution regarding the requested relief. The Prosecution objects to the requested relief.

10. **Additional Information:** In making this motion, or any other motion, Mr. Khadr does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this Military Commission to charge him, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in and all appropriate forms.

11. Attachments:

- A. Fields Report of Investigative Activity of 7 Dec 05
- B. Soldier #4 Report of Investigative Activity of 7 Dec 05
- C. Whalen Report of Investigative Activity of 7 Dec 05
- D. Defense Discovery Request of 9 November 2007
- E. Government response of 4 December 2007 to Defense Discovery Request of 9 November 2007
- F. After Action Report of 27 July 2002
- G. Memo re Operation to Positively Identify and Capture Suspected Bomb Maker in the Vicinity of Khost, Afghanistan of 28 July 2002, Bates No. 00766-001766-70
- H. Memo re Operation to Positively Identify and Capture Suspected Bomb Maker in the Vicinity of Khost, Afghanistan of 28 July 2002, Bates No. 00766-001653-57
- I. [REDACTED] and [REDACTED] emails of March 2004

/s/
William Kuebler
LCDR, USN
Detailed Defense Counsel

Rebecca S. Snyder
Assistant Detailed Defense Counsel

**CRIMINAL INVESTIGATION TASK FORCE (CITF)
REPORT OF INVESTIGATIVE ACTIVITY**

1. DATE OF INVESTIGATIVE ACTIVITY

[REDACTED]

2. PLACE

[REDACTED]

3. ACTIVITY NUMBER

[REDACTED]

4. REMARKS

[REDACTED]

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4. REMARKS (Continued)

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4. REMARKS (Continued)

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**CRIMINAL INVESTIGATION TASK FORCE (CITF)
REPORT OF INVESTIGATIVE ACTIVITY**

1. DATE OF INVESTIGATIVE ACTIVITY

[REDACTED]

2. PLACE

3. ACTIVITY NUMBER

[REDACTED]

4. REMARKS

[REDACTED]

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MILITARY COMMISSION

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

Defense Discovery Request

9 November 2007

1. The accused, Omar Khadr, by and through his detailed defense attorney, hereby requests that the government produce and permit the defense to inspect, copy, or photograph each of the items listed in the sections below. The defense requests that the government notify the defense in writing which specific items or requested information or evidence will not be provided and the reason for denial of discovery. The specific items listed below are examples, not limitations, of the items requested under a cited provision. The requested evidence is material to the preparation of the defense and/or is exculpatory. Defense counsel cannot properly provide effective assistance of counsel, nor prepare for trial, without production of the documents and items requested. The requested information is known, or should, with the exercise of due diligence, be known to the United States or its agents. If the government does not intend to provide defense with copies of documents or tangible objects the defense requests a reasonable opportunity to inspect, photograph and photocopy such documents or objects.

DOCUMENTS AND TANGIBLE EVIDENCE

2. All papers which accompanied the charges at preferral and referral, specifically to include, but not be limited to:
 - a. The charge sheet and all allied papers, transmittal documents accompanying the charges from one headquarters to another, or which accompanied the charges when they were referred to a military commission;
 - b. Any sworn or signed statement relating to an offense charged in this case;
 - c. All law enforcement reports whether prepared by military or civilian law enforcement personnel;
 - d. Any order purporting to refer the charges to a military commission, convening order, any pretrial advice given in conjunction with such an order, or any order appointing and describing the duties of the convening authority;
 - e. Any other qualifying document, order, or statement described in R.M.C. 701(b)(1)(A).
3. Any books, papers, documents, photographs, or copies or portions thereof and the opportunity to inspect tangible objects, buildings, or places that are in the possession,

custody, or control of military authorities, and that are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case in chief, or were obtained from or belong to the accused. R.M.C.701(c)(1). The foregoing shall include, but not be limited to:

- a. All drafts of FBI “302” forms and CITE “40” forms provided to the defense.
- b. All materials in the possession, custody or control of the government, including, without limitation, intelligence, law enforcement, or other files, relating to the participation of the following individuals in the conspiracy alleged in Charge III:
 - i. Usama Bin Laden
 - ii. Ayman Al Zawahiri
 - iii. Sayeed Al Masri
 - iv. Saif Al Adel
 - v. Ahmed Said Khadr
- c. All materials within the possession, custody and control of the government relating to the investigation and prosecution of [REDACTED].
- d. All materials within the possession, custody and control of the government relating to the investigation and/or prosecution of other individuals for detainee mistreatment or abuse at Bagram Airbase, Afghanistan, between July 2002 and November 2002.
- e. All materials within the possession, custody, and control of the government relating to or describing events forming the basis for the charges, including, but not limited to, reports prepared by a non-DoD federal agency referenced in discussions between the prosecution and defense on or about 6 November 2007.
- f. A list of all eyewitnesses to the events forming the basis for the charges.
- g. Any handwritten statement prepared by the accused.
- h. All results of any interrogations or interview of the accused.
- i. Any videotape, real-time, or other imagery relating to the events forming the basis for the charges, including, without limitation, any videotape, “gun camera” footage or other recording of said events. R.M.C.701(c)(1).
- j. Any physical evidence seized from the site of the 27 July 2002 fire at or near Khost, Afghanistan, including, but not limited to, circuit boards, watches, or other materials allegedly used to manufacture explosive devices. R.M.C.701(c)(1).
- k. Any video or audio tape recording of any interrogation or interview of the accused by any person or entity, including, but not limited to, any video or audio tape recording

of interviews by Canadian intelligence and/or law enforcement officials.
R.M.C.701(c)(1).

- l. Shrapnel, or other physical evidence seized from the bodies of Christopher Speer and the two Afghan Military Force members identified in the overt acts alleged in Charge III. R.M.C. 701(c)(1).
 - m. All interrogation manuals, directives, instructions and other policy guidance issued by any agency involved in any aspect of the intention and interrogation of the accused or of any other witness in the case, including individuals whose statements the government provides to the defense through discovery.
4. Any death investigations, homicide reports, pathology reports and all other evidence relating to the deaths of Christopher Speer and the two Afghan Military Force members identified in the overt acts alleged in Charge III. R.M.C. 701(c)(1).
 5. The defense requests notification of testing upon any evidence that may consume the only available samples of the evidence and an opportunity to be present at any such testing; and an opportunity to examine all evidence, whether or not it is apparently exculpatory, prior to its release from the control of a government agency or agents. *United States v. Mobley*, 31 MJ. 273, 277 (C.M.A. 1990); *United States v. Garries*, 22 M.J. 288, 293 (C.M.A. 1986).
 6. Please provide all chain of custody documents or litigation packets generated by any law enforcement or military agency in conjunction with the taking or testing of evidence during the investigation of the alleged offenses.
 7. Any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, that are within the possession, custody, or control of military authorities at all any level, the existence of which is known, or by the exercise of due diligence may become known, to the trial counsel, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case in chief at trial. R.M.C. 701(c)(2). This specifically includes, but is not limited to:
 - a. Copies of the records of any and all medical screenings, physicals, examinations, mental health evaluations, as well as notes prepared by any treating physician, physician's assistant, medic, psychiatrist, psychologist, chaplain, counselor, or other person who has examined the mental or physical condition of the accused at any time since he entered the custody of the United States, including, but not limited to, all files on the accused created or kept by the "Behavioral Sciences Team" mentioned in the document identified by Bates number 00766-012575.
 - b. The defense does not authorize the government to review or examine any such reports, notes, or other documents as they may be covered by M.C.R.E. 503 or 513, by M.C.R.E. 302, or by common-law privileges and privacy interests with respect to medical treatment. The defense does, however, request that the government order any such material turned over to the defense and provide contact information for any person who obtained or created such reports or other materials.

8. Any statement - oral, written, or recorded - made or adopted by the accused, that are within the possession, custody, or control of the Government, the existence of which is known or by the exercise of due diligence may become known to the trial counsel, and are material to the preparation of the defense or are intended for use by trial counsel as evidence in the prosecution case-in-chief at trial. R.M.C. 701(c)(3).
9. All written material that will be presented by the government as evidence at the presentencing proceedings. R.M.C. 701(d)(1).
10. All writings or documents used by a witness to prepare for trial, to include any writings or documents used by any witness to refresh memory for the purpose of testifying, either while testifying or prior to testifying. M.C.R.E. 612.
11. A photocopy of the entire CITF or other investigative files, to include all case notes, case agent summaries, interim, final and supplemental CITF reports, interrogation reports, photographs, slides, diagrams, sketches, drawings, electronic recordings, handwritten notes, interview worksheets, and any other information in the CITF case file or associated with this case, including the files of any other government agency not a part of CITF. Additionally, the defense requests the names, current addresses, and current telephone numbers and email addresses of all government and civilian investigators who have participated in the investigation. R.M.C. 701(b)(1)(C); R.M.C. 701(b)(2).

STATEMENTS AND WITNESSES

12. All statements, in any form to include, but not limited to, hand-written, typed or recorded statements or summaries of conversations, concerning the offenses that are in the possession of the government. This includes all statements of any person, not just the accused or potential government witnesses, taken by or given to any person or agency including all civilian or military law enforcement agencies, inspector general investigations, intelligence agencies, military units, or any other agency or person involved in this case. R.M.C. 701(b)(1)(C); R.M.C. 701(c)(1); R.M.C. 701(c)(3).
13. Provide all oral and written statements made by government witnesses relating to this case, R.M.C. 914, 18 U.S.C. § 3500 et. seq.
14. Provide the names, addresses and telephone numbers (commercial and DSN, if applicable) of all witnesses the government intends to call to rebut a defense of alibi or lack of mental responsibility. R.M.C. 701(b)(2)(B). At this time, the defense does not claim that the accused has an alibi defense or that the accused lacked mental responsibility at the time of the charged offense. If such a defense becomes known, the defense will notify the government. The defense cannot make a determination about the latter defense until the government has complied with all discovery requested in paragraph 4 of this request.
15. Provide all hearsay statements, oral or written, intended to be offered at trial under M.C.R.E. 803. Please provide notice of the intent to offer the statement and “the particulars of the evidence” including the time, place and conditions under which the statement was obtained, the name of the declarant and the declarant’s telephone numbers and address. M.C.R.E. 803(b).

16. Provide information concerning any immunity or leniency granted or promised by any government witness in exchange for testimony. R.M.C. 701(c)(1); M.C.R.E. 301(c)(2).
17. Any intent by the government to invoke R.M.C. 701(f) or M.C.R.E. 505 or 507, as well as the purpose and rationale supporting the invocation of such a privilege. If the government does invoke such privilege, the defense requests immediate compliance with R.M.C. 701(f)(3), 701(f)(5), and 701(f)(6). The defense intends to challenge the government's use of this privilege and, in order to prepare for litigation of the matter, requests the production of summaries of the evidence as contemplated by R.M.C. 701(f)(3) and 701(f)(5).
18. The identity, including name, address, and telephone number, of any informants and/or notice of a government's intent to exercise privilege under M.C.R.E. 507.
19. Disclose all evidence affecting the credibility of government witnesses to include, but not limited to:
 - a. Prior civilian and court-martial conviction and all arrests or apprehension of government witnesses. In complying with this discovery request, the defense requests the government check with the National Crime Information Center (NCIC), National Records Center (NRC), and all local military criminal investigatory organizations for each witness. *United States v. Jenkins*, 18 M.J. 583, 584-585 (A.C.M.R. 1984); R.M.C. 701(c).
 - b. Records of nonjudicial punishment, or adverse administrative actions (pending and completed), whether filed in official files or local unit files including, but not limited to, discharge prior to expiration of term of service for any reason, relief for cause actions, letters or reprimand or admonition and negative counseling relating to adverse or disciplinary actions concerning any government witness. R.M.C. 701(c).
 - c. All investigations of any type or description, pending initiation, ongoing or recently completed that pertain to alleged misconduct of any type or description committed by a government witness. *United States v. Stone*, 40 MJ. 420 (C.M.A. 1994); R.M.C. 701(c).
 - d. All evidence in control of or known to the United States concerning the mental status of the accused or any government witness. *United States v. Green*, 37 MJ. 88 (C.M.A. 1993). Material sought includes, but is not limited to, medical records reflecting psychiatric diagnosis or treatment or head injury of any type and drug and/or alcohol addiction diagnosis or rehabilitation records. *United States v. Brakefield*, 43 C.M.R. 828 (A.C.M.R. 1971); *United States v. Brickey*, 8 M.J. 757 (A.C.M.R. 1980) affirmed 16 M.J. 258 (C.M.A. 1983); *United States v. Eschalomi*, 23 M.J. 12 (C.M.A. 1985); R.M.C. 701(c)(2).
 - e. Evidence of character, conduct or bias bearing on the credibility of government witnesses in the control of or known to the United States including, but not limited to: information relating to any past, present, or potential future plea agreements, immunity grants, payments of any kind and in any form, assistance to or favorable treatment with respect to any pending civil, criminal, or administrative dispute

between the government and the witness, and any other matters that could arguably create an interest or bias in the witness in favor of the government or against the defense or act as an inducement to testify to color or shape testimony. *Giglio v. United States*, 405 U.S. 15 (1972); R.M.C. 701(c).

- f. The current and, if applicable, the former military status of all witnesses to include: the date of separation, the discharge status and a summary of the circumstances explaining any discharge; further, please provide copies of the each government military witnesses' counseling file. R.M.C.701(c).
 - g. Copies of the official civilian personnel file of any government witness that is a civilian employee of the United States. R.M.C.701(c).
 - h. The results of any polygraph examinations, including the Polygraph Examiner Report and related polygraph records, the Polygraph Consent Form, the Polygraph Examination Authorization Request, the Polygraph Examination Quality Control Review and any rights certificate executed by the examiner and the subject. *United States v. Mougenel*, 6 M.J. 589 (A.F.C.M.R 1978); *United States v. Simmons*, 38 M.J. 376 (C.M.A.1993); R.M.C. 701(c).
 - i. Any writing or document used by a witness to prepare for trial. M.C.R.E. 612.
 - j. The contents of all CITF accreditation files for all CITF investigators who have participated in investigations relating to this case, and similar such files for agents of any other government agency who have have participated in investigations relating to this case. R.M.C.701(c).
20. A copy of the Official Military Personnel File (OMPF) of all witnesses intended to be called by the Government on the Government's case in chief or during the pre-sentencing phase of the trial. R.M.C.701(c)(1).
21. Notice of whether the government intends to impeach any witness with a conviction older than ten years. M.C.R.E. 609(b).

EVIDENCE REGARDING ACCUSED

22. The defense requests the contents of all statements, oral or written, made by the accused that are relevant to the case, known to the trial counsel and within control of the armed forces, regardless whether the government intends to use the statements at trial. M.C.R.E. 304(d)(1); *United States v. Dancy*, 38 M.J. 1, 4 (C.M.A. 1993).
23. Notice of all evidence seized from the person or property of the accused or believed to be owned by the accused that is intended to be offered at trial.
24. Evidence of any prior identification of the accused at a traditional line up, photo line up, show up, voice identification or other identification process that the government intends to offer against the accused at trial, or failure or misidentification of the accused at any such procedure. R.M.C. 701(c)(1); R.M.C. 701(b)(1)(C); R.M.C. 701(b)(2); R.M.C. 701(e).

25. Provide notice of the general nature of evidence of other crimes, wrongs, or other misconduct, the government intends to offer at trial as well as the government's theory of admissibility concerning the prior conduct. M.C.RE. 404(b).
26. All documents or information regarding any mistreatment of Mr. Khadr at the hands of U.S. or Allied Armed Forces, civilians or contractors of which the government is aware. This includes any recorded allegation of such mistreatment made by the accused, any witness to the mistreatment, or any non-governmental organization (e.g., the International Committee for the Red Cross) that purports to document allegations of mistreatment. M.C.R.E. 304, R.M.C. 701(e).
27. All documents and information related to the capture and/or detention of the accused. This includes documents and information regarding the circumstances of capture, transfer to U.S. authorities (if applicable), subsequent transfers between places of detention (to include means, methods and dates of transfer), the identity of all U.S. Military units and individuals responsible for and involved in his detention, all records regarding the accused's detention up to and including Guantanamo Bay Naval Station, Cuba, and conditions of detention. This should include a detailed chronology showing each and every place in which the accused has been held in confinement from the time of his capture in Afghanistan to the present date. R.M.C. 701(c).
28. The names, duty positions, and contact information of all personnel who ordered, supervised, or directed the confinement of the accused from the time of his capture in Afghanistan to the present date. R.M.C. 703; R.M.C. 701(e).
29. The names, duty positions, and contact information of all personnel who interrogated, questioned, guarded, or otherwise interacted with the accused since the time of his capture in Afghanistan. R.M.C. 703; R.M.C. 701(e).
30. The defense requests that the government provide all documents related to the conditions under which the accused was held from the time of his capture to the present date. This includes, but is not limited to, all written orders, memoranda, directives, SOPs, or other documents that purport to direct agents of the US government in the manner in which the accused should be treated, fed, housed, and given medical attention. This also includes any information relating to mistreatment, abuse, inhumane treatment or conditions, degrading treatment or conditions, cruel or oppressive treatment or conditions, or torture, that is known, suspected, or alleged to have occurred since the date of the accused's capture in Afghanistan. R.M.C. 701(e); R.M.C. 701(c)(l).
31. All documents and information related to considerations and determinations by the United States or its agents concerning the accused's "status" as a detainee (i.e., whether the accused should be given the status of prisoner of war, unlawful enemy combatant, civilian internee, etc.). R.M.C. 701(c)(l).
32. All documents and information related to considerations and determinations by the United States or its agents concerning whether the United States was in a state of "armed conflict" (as that term is defined under international law) with the Taliban, al Qaeda, or any alleged

terrorist organizations, or any nation-states allegedly sponsoring terrorist organizations from approximately 1990 through the present, and whether any such armed conflict was “international”, “internal/non-international” or “internationalized” (as those terms are defined under international law) in character. R.M.C.701(c)(I).

33. All interrogation techniques used against detainees in Afghanistan, aboard U.S. vessels, or at the U.S. Naval Base in Guantanamo Bay, Cuba, as well as identification of which methods were used against detainees whose statements and/or testimony the prosecution intends to introduce at trial. This includes techniques used against Mr. Khadr, as well as against any other detainee whose statements and/or testimony the prosecution intends to introduce at trial. M.C.R.E. 304, R.M.C. 701(e), R.M.C. 701(c)(I).

OTHER EVIDENCE MATERIAL TO THE PREPARATION OF THE DEFENSE

34. The defense requests all exculpatory, extenuating, or mitigating evidence known, or, which with reasonable diligence should be known, to the trial counsel that tends to negate the guilt of the accused of any offense charged, reduce the guilt of the accused of an offense charged, or reduce the punishment. *Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Agurs*, 427 U.S. 97 (1976); *United States v. Bagley*, 473 U.S. 667 (1985); *United States v. Simmons*, 38 M.J. 376, 381 (C.M.A. 1993); *United States v. Kinzer*, 39 M.J. 559 (A.C.M.R. 1994); *United States v. Sebring*, 44 M.J. 805 (N.M. Ct. Crim App. 1996); R.M.C. 701(e).
35. Request all evidence in rebuttal that is exculpatory in nature or material to punishment. *United States v. Trimper*, 460 M.J. 460 (C.M.A. 1989); *United States v. Dancy*, 38 M.J. 1 (C.M.A. 1993); R.M.C. 701(e).

COMMISSION MEMBERS AND PRESIDING OFFICER SELECTION

36. The defense requests the personnel files and officer record briefs of each member of the commission. Additionally, defense requests any questionnaires submitted by trial counsel to each member and the member’s responses. R.M.C. 912.
37. All written matters provided to the convening authority concerning the selection of the members detailed to the commission. R.M.C. 912(a)(2).
38. The convening order, all amending orders and all requests to be excused received from commission members and any written documents memorializing the denial or approval of the request. R.M.C. 701(b)(1)(B); R.M.C. 912(a)(2).
39. All documents and information related to the identification, review and appointment of commission members. This request includes all documents and information submitted or considered by agents of the United States, regardless of whether the convening authority or her designees considered such matters. Such documents and information include, but are not limited to, the following:
 - a. The process used to select the pool of potential commission members, the requests and content of verbal requests for potential commission members, and any criteria to

- be included or excluded in selecting the pool of potential commission members (e.g., rank, gender, combat experience, etc.).
- b. Any discussions or interviews of potential commission members that agents of the United States participated in or conducted, including, but not limited to, interview notes.
 - c. Criteria used in selecting commission members including any communication of any kind made to the convening authority that relate to the qualifications, fitness, availability, character, temperament, or other characteristics of any member.
 - d. Any public or private writings or statements made by commission members related to military commissions.
 - e. Any other information bearing on the potential impartiality or bias of commission members. R.M.C. 701(b)(1)(B); R.M.C. 912(a)(2).

JUDICIAL NOTICE

- 40. Provide all matters that the government intends to have judicially noticed. M.C.R.E. 201.
- 41. Provide notice and a legible copy of all law, foreign and domestic, of which the government intends to ask the judge to take judicial notice. M.C.R.E. 201A.

EXPERTS

- 42. The defense requests notice of, and the curricula vitae for, all expert witnesses the government intends to call in its case-in-chief and during pre-sentencing. The defense requests the government disclose the number of times each expert has been qualified as an expert witness in a military or civilian court, the types of court each witness has testified in (civilian or military), the locations (city and state) of each of these courts and the civil and criminal docketed number of each of those cases. The defense further requests disclosure of any information, or evidence considered by the expert prior to testifying. R.M.C. 705.

COMMAND INFLUENCE

- 43. The defense requests all statements, oral or written (including e-mail), made by the convening authority in this case or by any officer (military or civilian) superior to the convening authority, whether written or oral, that:
 - a. withhold from a subordinate commander or from any agent of the government the authority to dispose of the accused's case in a court-martial or federal criminal trial in District Court;
 - b. provide guidance to any civilian or military authority in this case concerning appropriate levels of disposition and punishment of the offenses, to include types and severity of any restrictions on liberty, either made before or after the offenses at issue in this case; or,

- c. indicate that the officer has anything other than an official interest in the matter, *United States v. Jeter*, 35 M.J. 442, 445 (C.M.A. 1992); R.M.C. 923; R.M.C. 1008.
44. Disclosure of any information known to government agents that indicates that a person who forwarded the charges with recommendation is now, or has recently been suspected of committing an offense under the UCMJ. *United States v. Nix*, 40 M.J. 6 (C.M.A. 1994).

INSTRUCTIONS

45. The defense requests the government provide all proposed instructions it intends to request the commission to use in its instructions to the members and the authority for each instruction.

RULES OF PROCEDURE AND EVIDENCE

46. The defense requests that the government produce the following, which is information material to the defense and without which the defense does not believe it can be effective:
- a. Copies of any drafter's analysis, notes, memoranda, emails, circulars, or any other written communication or information regarding the formulation of the rules of procedure and evidence used in these military commissions, how and why rules were drafted as they were, dissents or objections to the formulation, language, construction, or meaning of these rules, and rights provided under these rules.
 - b. Sources of law upon which the drafters of these rules relied.
 - c. The identity, job description, and contact information of any person involved in, or consulted regarding, the formulation and drafting of these rules.

EVIDENCE REGARDING INDIVIDUALS HELD BY THE UNITED STATES

47. The identity and photographs of all individuals detained by the United States or coalition countries, presently or in the past, who are believed to be associated with al Qaeda, so that these individuals can be screened by the defense and accused to search for potential witnesses. R.M.C. 703.
48. Copies of all message traffic from the capturing unit, from Central Command, or from any higher U.S. authority regarding the "status" under the Geneva Convention, movement and treatment of Mr. Khadr. R.M.C. 703; R.M.C. 701(c)(1).
49. A list of the names and ISN numbers of all released detainees from Naval Base Guantanamo Bay with accompanying photographs. R.M.C. 703.
50. Access to review and copy all records in the possession of the government regarding the accused and any other detainee to which the defense is granted access. R.M.C. 703; R.M.C. 701(c)(1).

EVIDENCE HELD BY THE CANADIAN GOVERNMENT

51. The defense requests your assistance in obtaining the following information under the control of the Canadian government:

- a. Copies of all audio or video recordings of interrogations of the accused conducted by Canadian investigators or diplomatic personnel or in which they participated or observed. R.M.C. 701(c)(3); M.C.R.E. 304.
- b. Interviews of the Canadian investigators involved in the investigation of the accused. R.M.C. 701(c)(3); M.C.R.E. 304.
- c. Diplomatic correspondence or other communications between the U.S. and Canadian governments relating to the detention, interrogation, investigation or transfer of the accused.

EVIDENCE OF AND CONTENTS OF MONITORING OF THE ACCUSED IN CONSULTATION WITH HIS COUNSEL OR OF COMMUNICATIONS OF AND BETWEEN COUNSEL

52. The defense requests notice of, reasons for, and the dates, nature, and content of any communication monitored in any way between the accused and his counsel, or any communication between or by counsel for the accused, by any government agency at any time during the processing, trial, or other course of this case. If no such monitoring has occurred, the defense requests a statement to that effect from government counsel.

CONCLUSION

The defense requests equal and adequate opportunity to interview witnesses and inspect evidence. Specifically, the defense requests the trial counsel to instruct all of the witnesses and potential witnesses under military control, including those on any retired list to cooperate with the defense when contacted by the defense for purposes of interviewing these persons or otherwise obtaining information from them. R.M.C. 703. This discovery request is continuing and shall apply to any additional charges or specifications that may be preferred after this request for discovery is served upon the government. Immediate notification is requested on all items the government is unable or unwilling to produce.

By: /s/
William Kuebler, LCDR, JAGC, USN
Detailed Defense Counsel

Rebecca S. Snyder
Assistant Detailed Defense Counsel



DEPARTMENT OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

OFFICE OF THE CHIEF PROSECUTOR

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

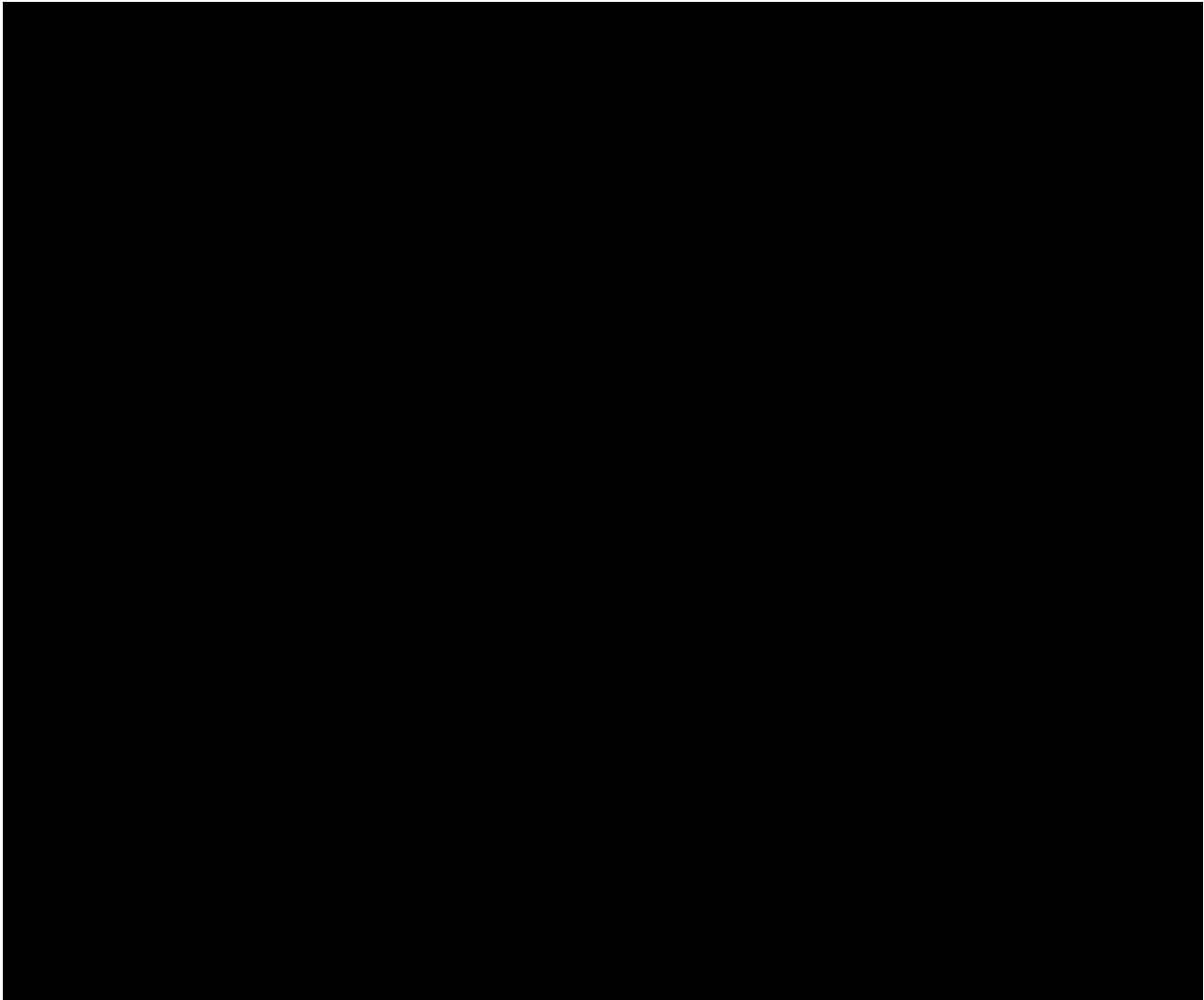
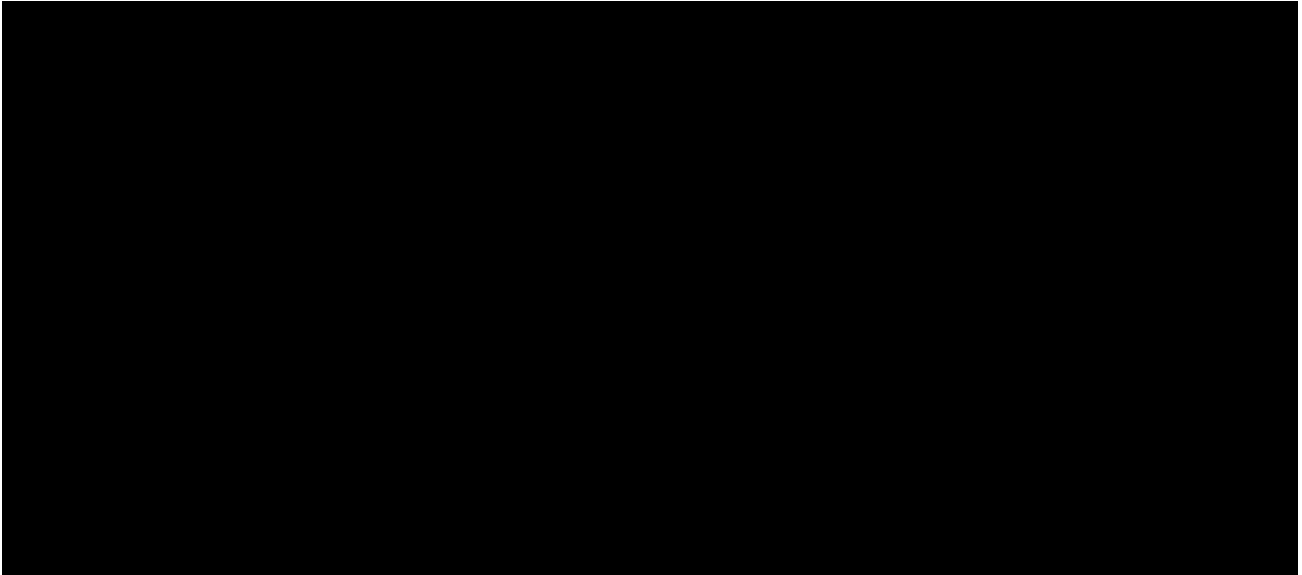
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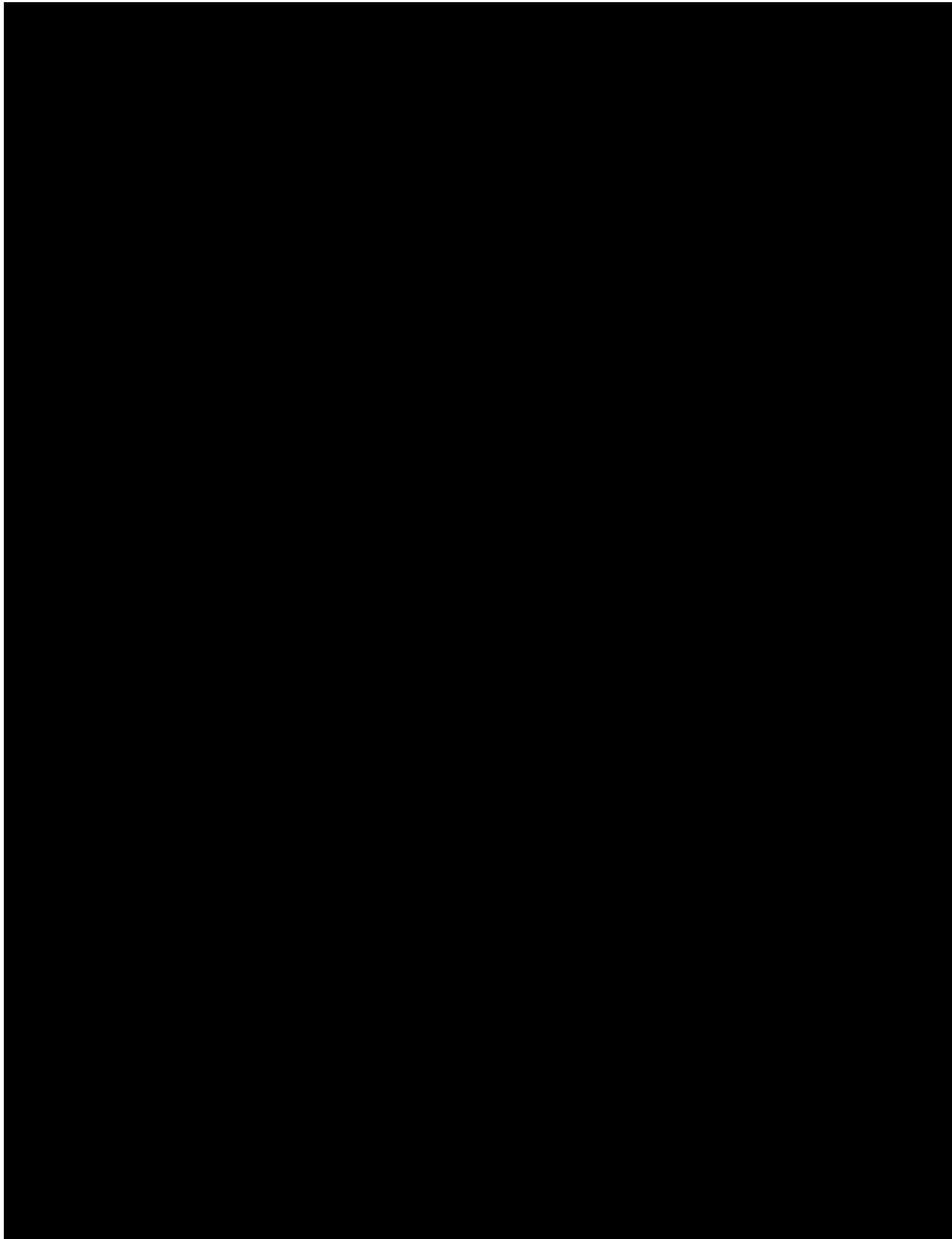
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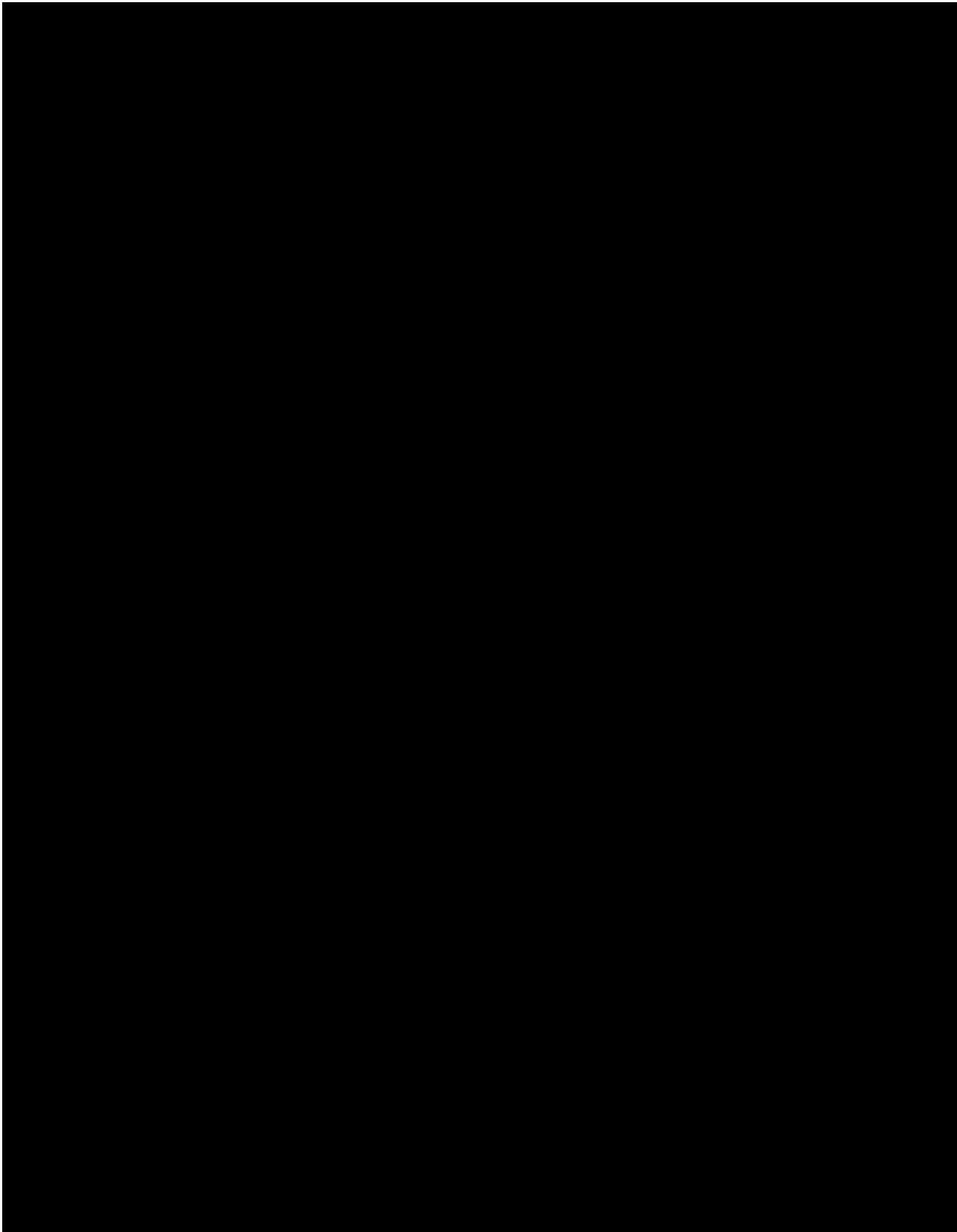
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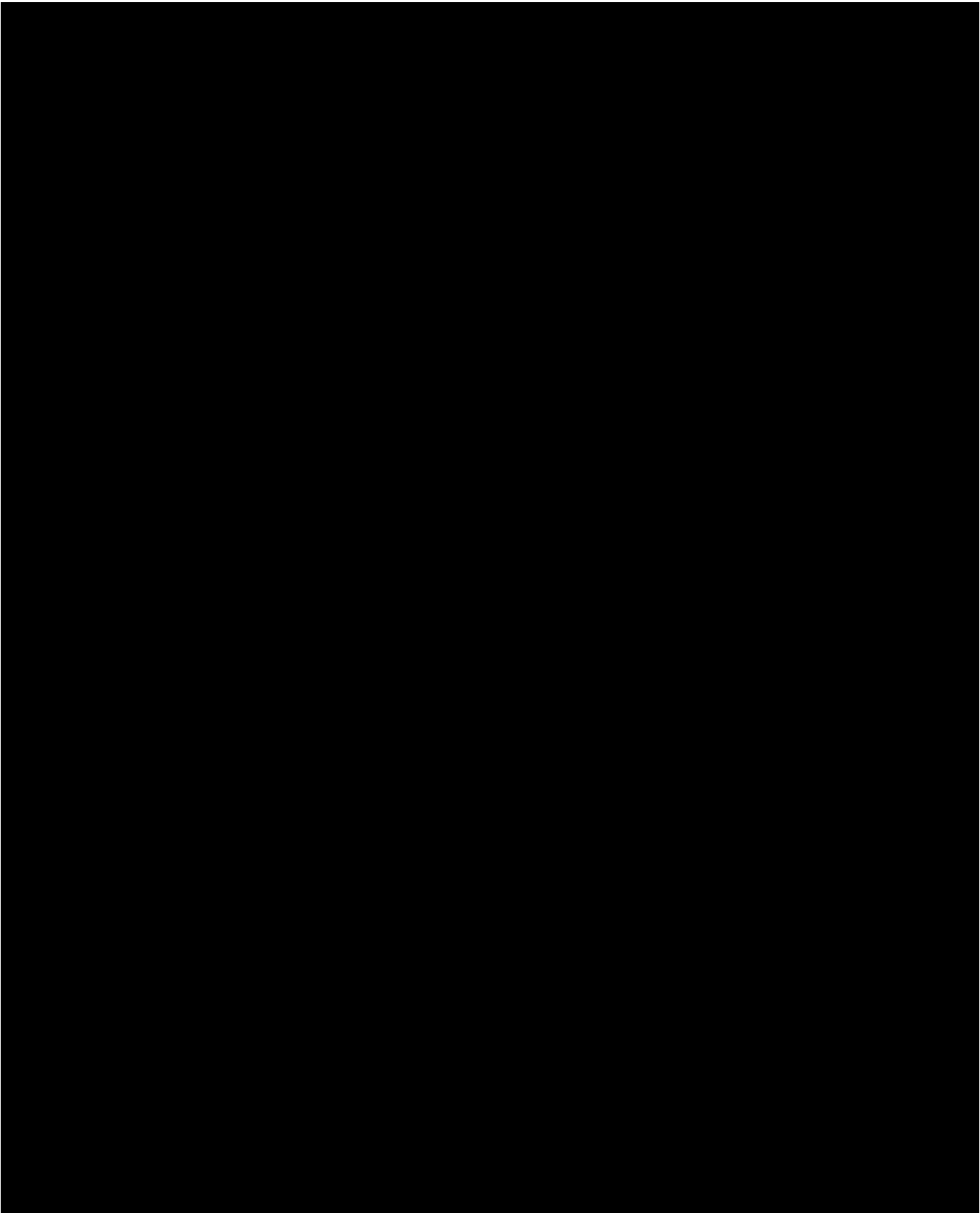


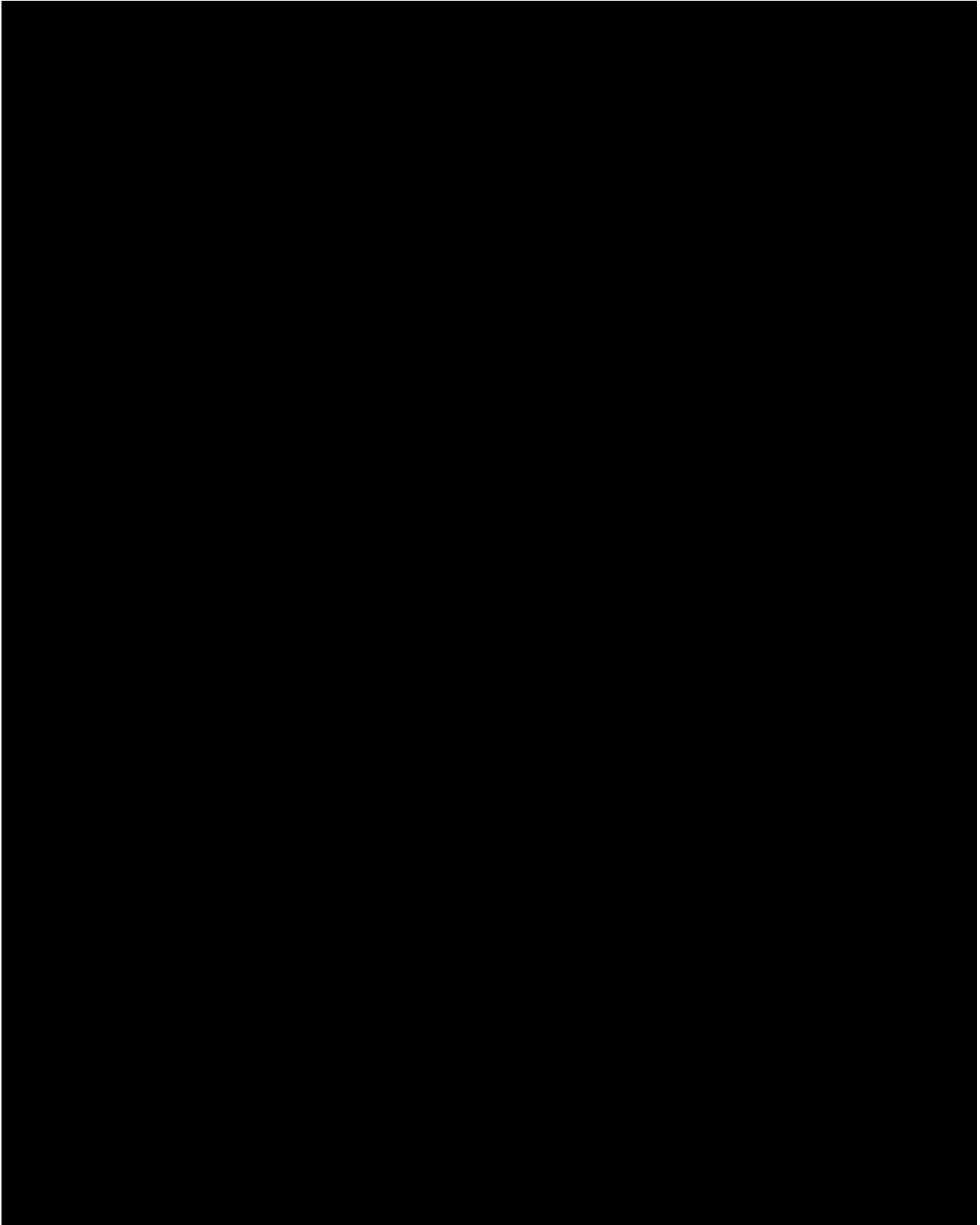
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LAW ENFORCEMENT SENSITIVE



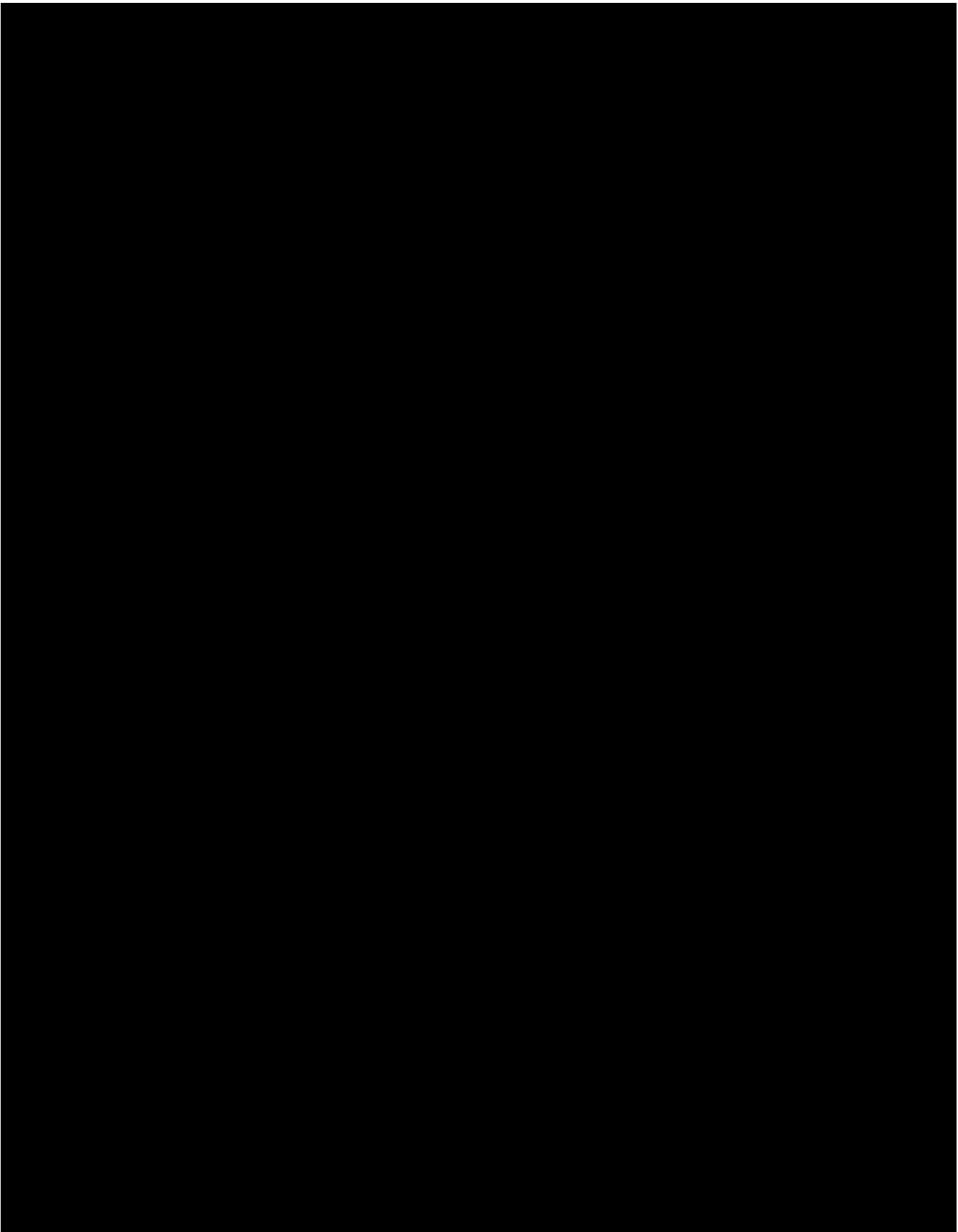


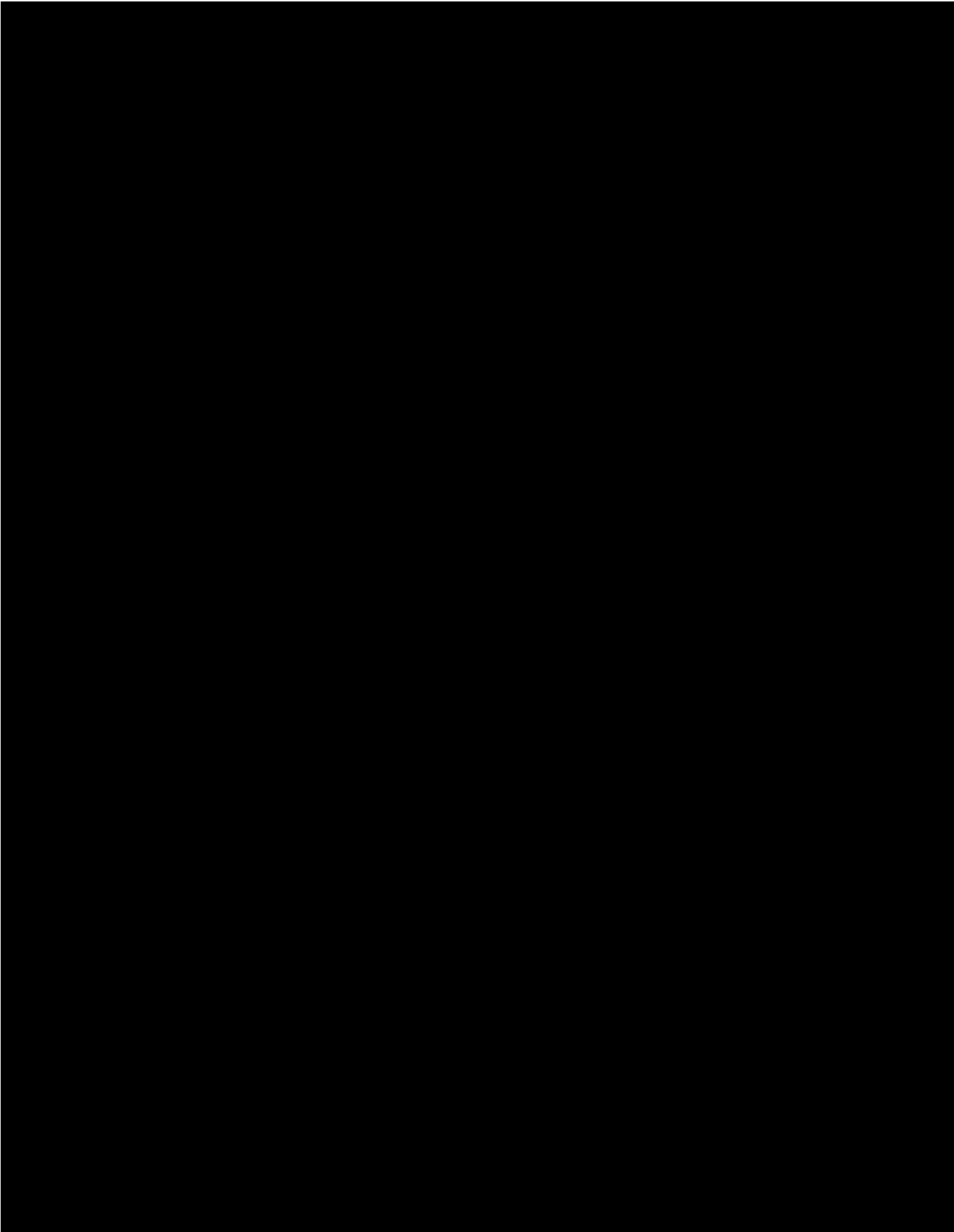
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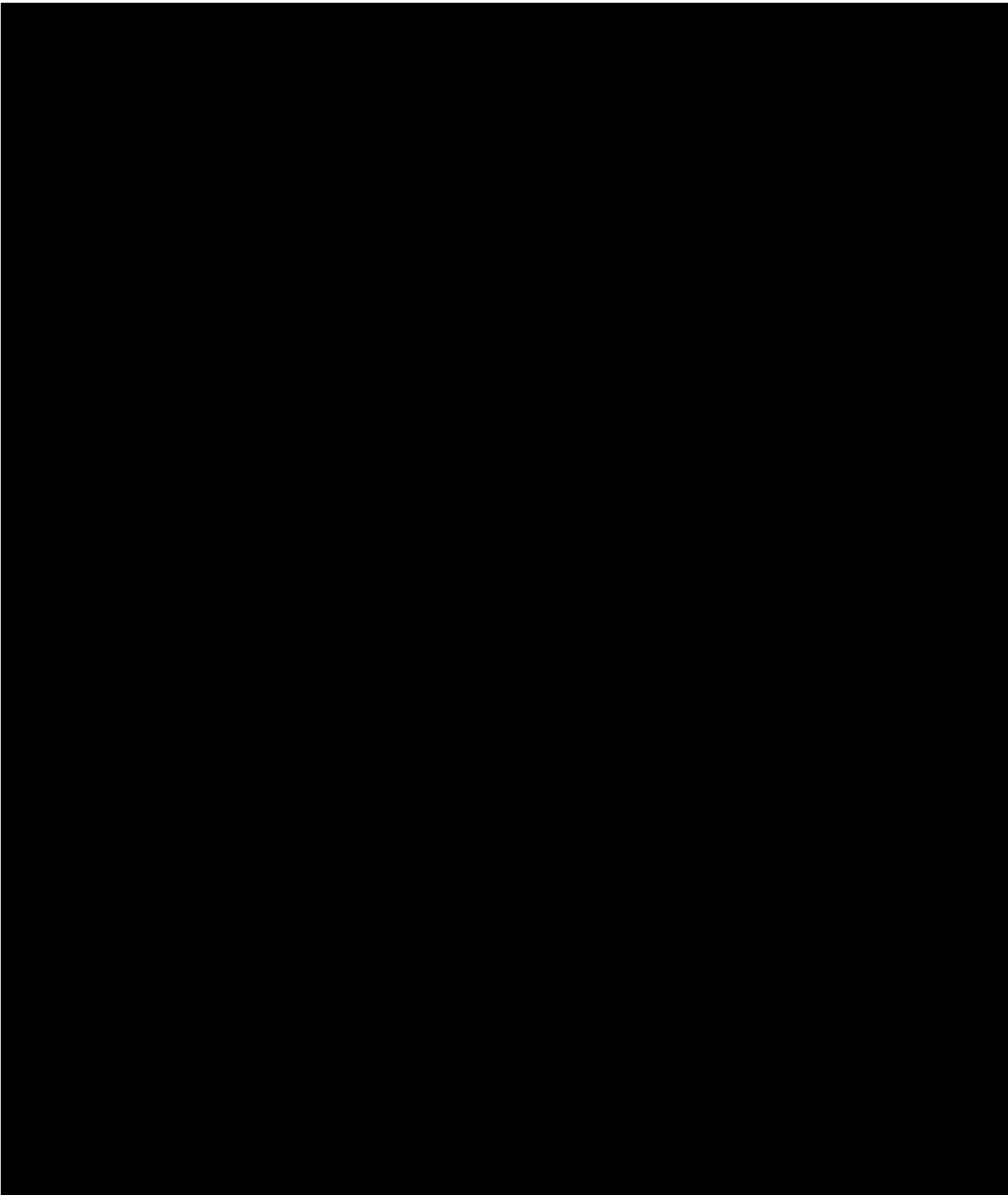


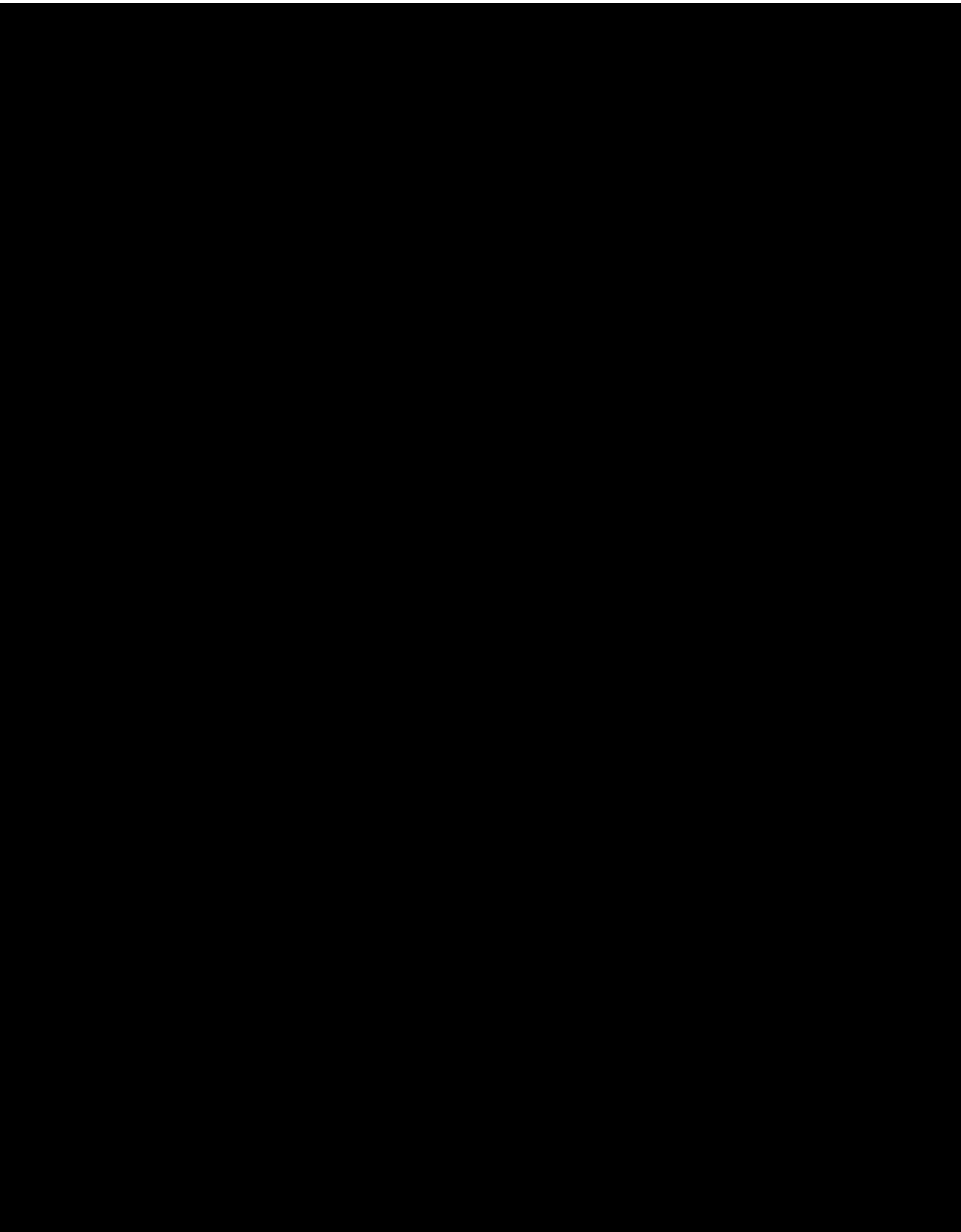


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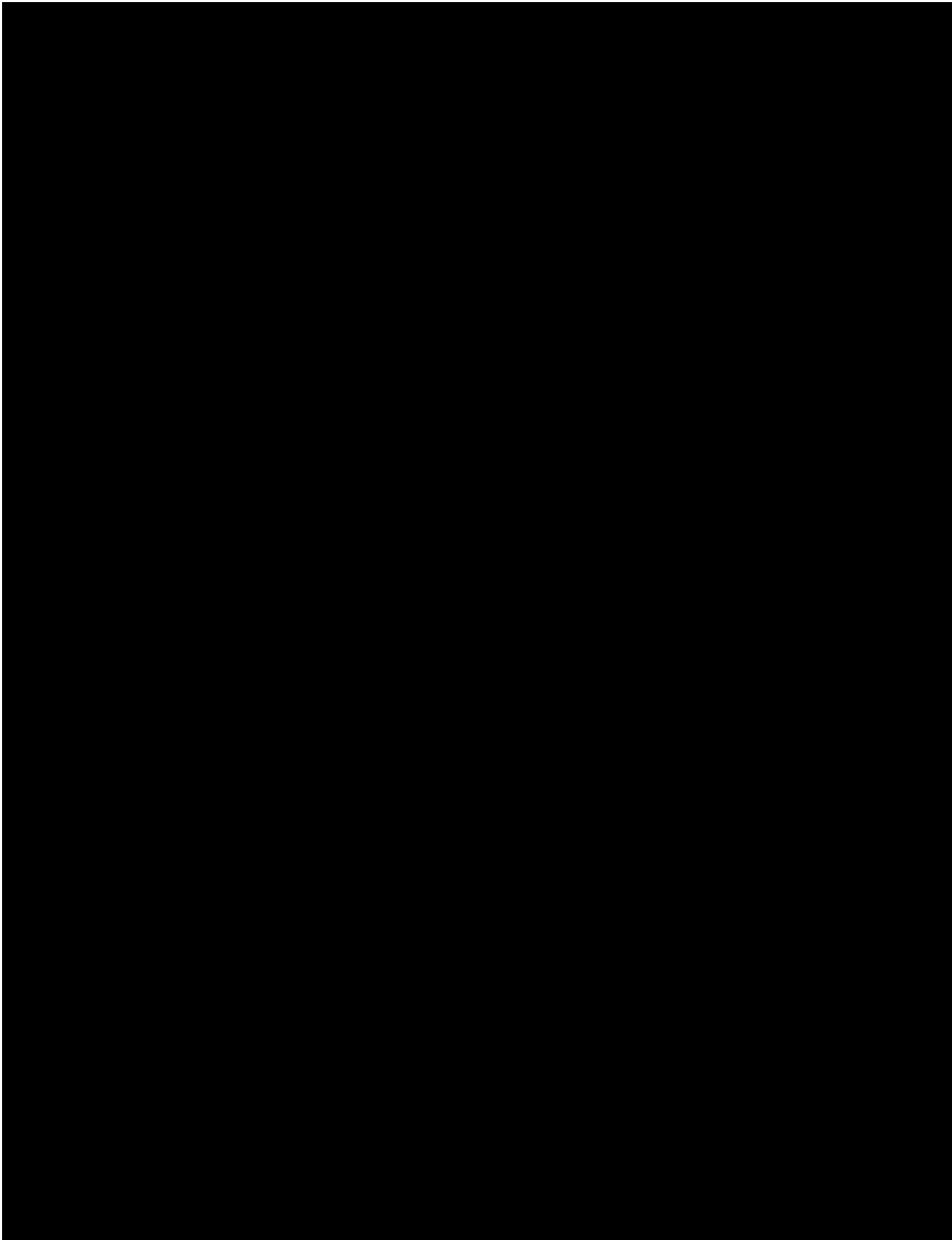




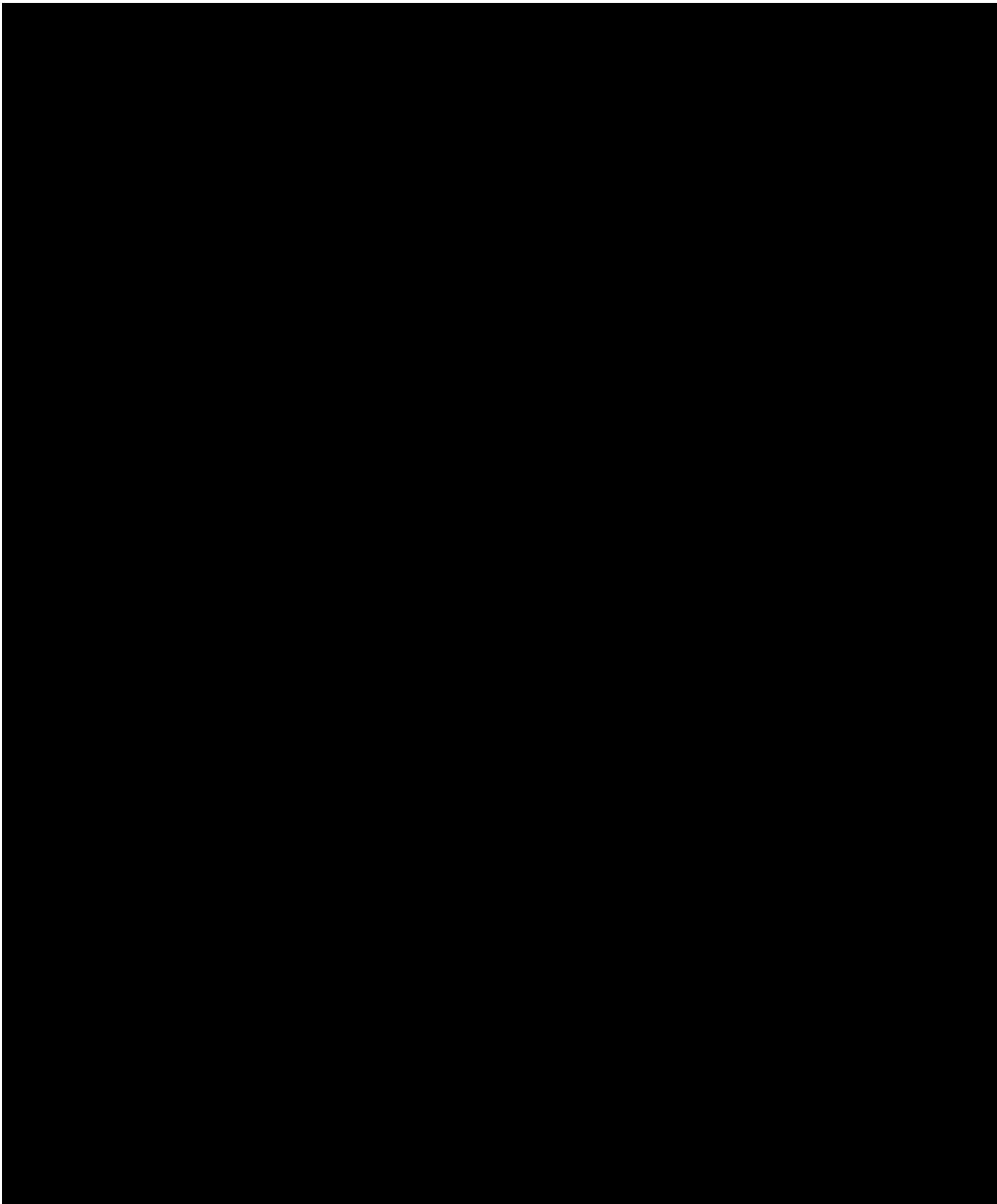


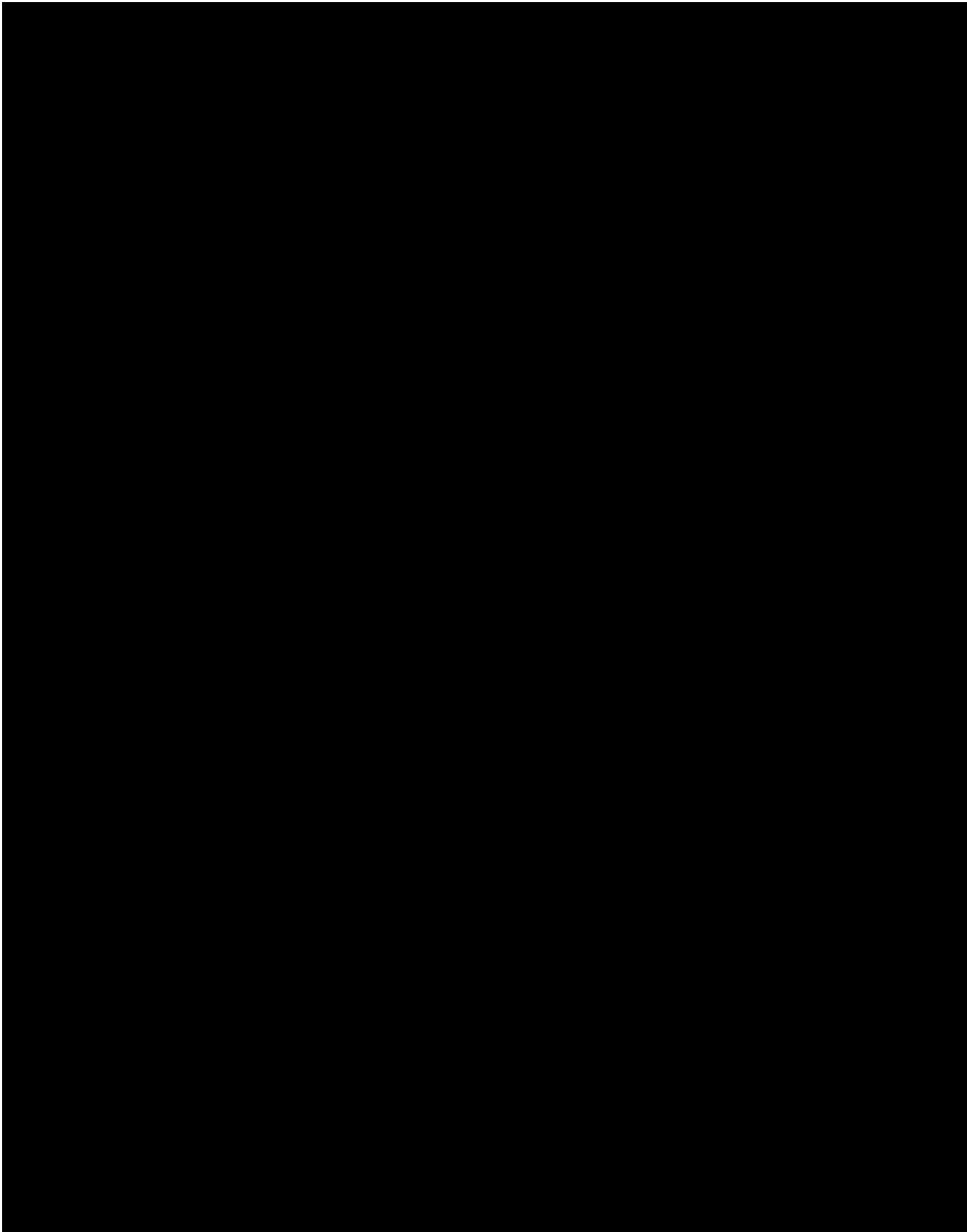


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LAW ENFORCEMENT SENSITIVE



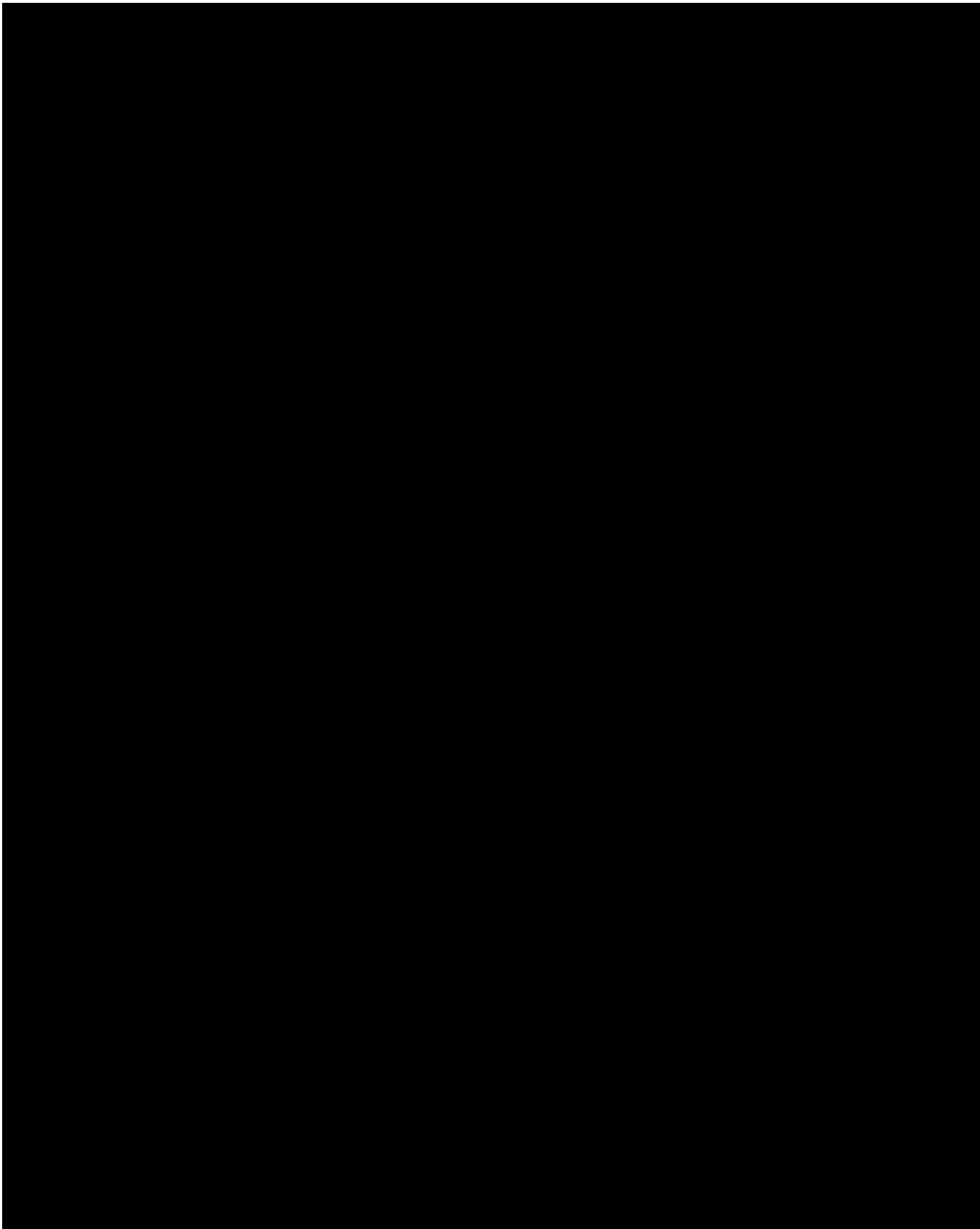


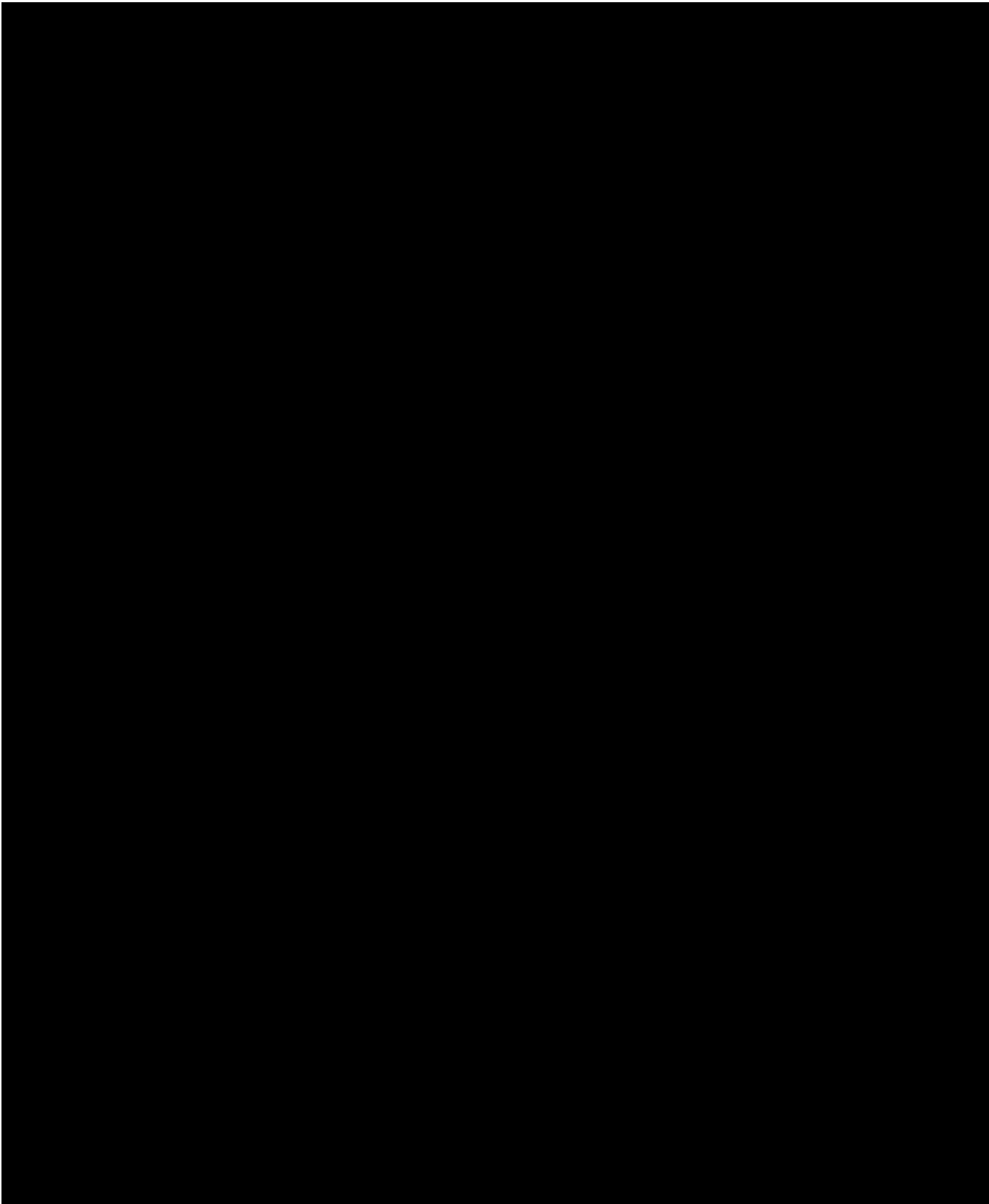




FOR OFFICIAL USE ONLY
LAW ENFORCEMENT SENSITIVE

15







REPLY TO
ATTENTION OF:

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As a result, the *Journal of Management Studies* has been able to publish a wide range of research, including work on the impact of the environment on business, the role of the state in the economy, and the impact of globalization on the world economy. The journal has also been able to publish work on the impact of the environment on business, the role of the state in the economy, and the impact of globalization on the world economy.

Year	Total Population (%)	Population 65+ (%)
1950	12.0	4.0
1960	13.0	4.5
1970	14.0	5.0
1980	15.0	5.5
1990	16.0	6.0
2000	17.0	6.5
2010	18.0	7.5
2020	19.0	9.0
2030	20.0	11.0
2040	20.5	13.0
2050	21.0	15.0

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DEPARTMENT OF THE ARMY

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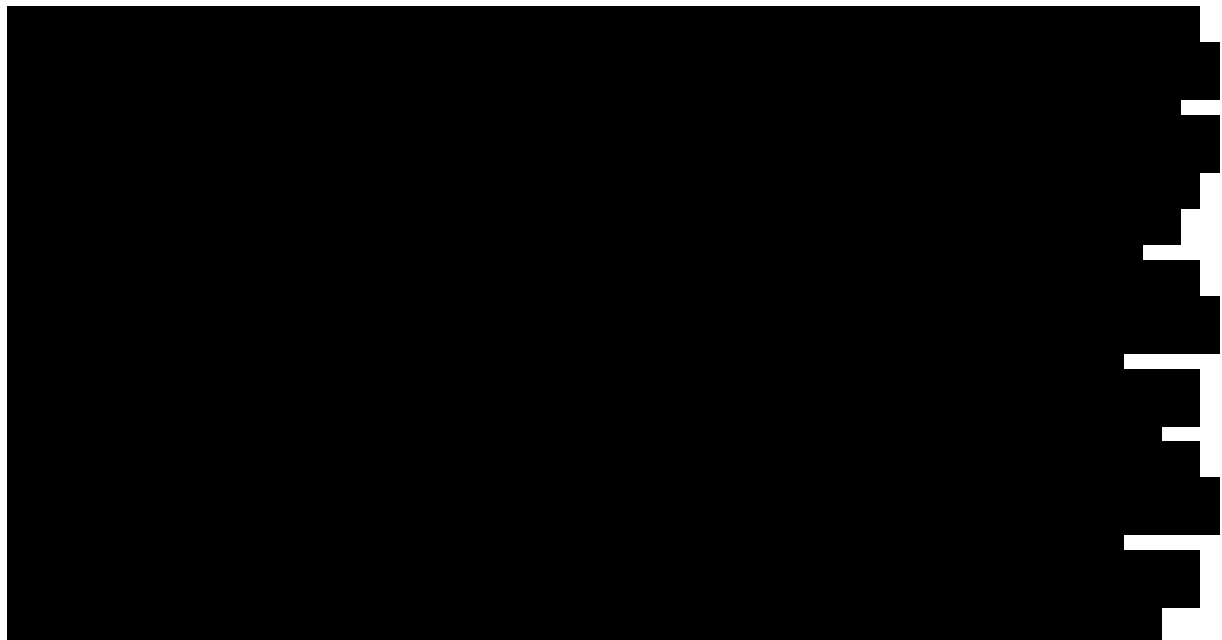
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DEPARTMENT OF THE ARMY

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REPLY TO
ATTENTION OF:

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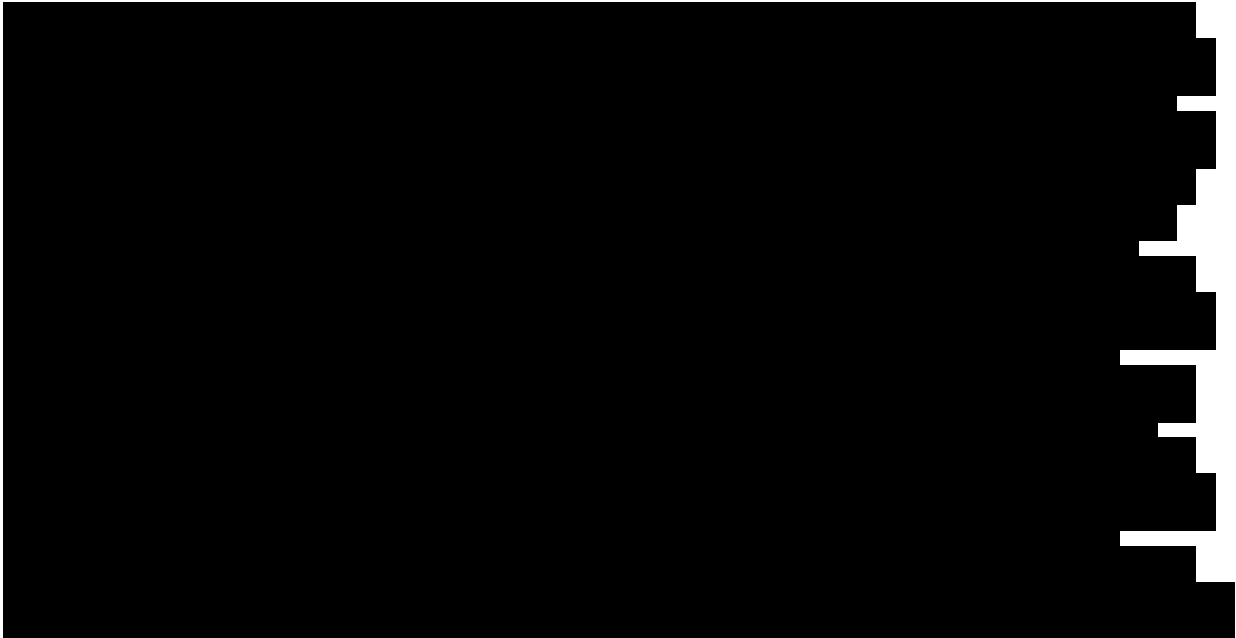
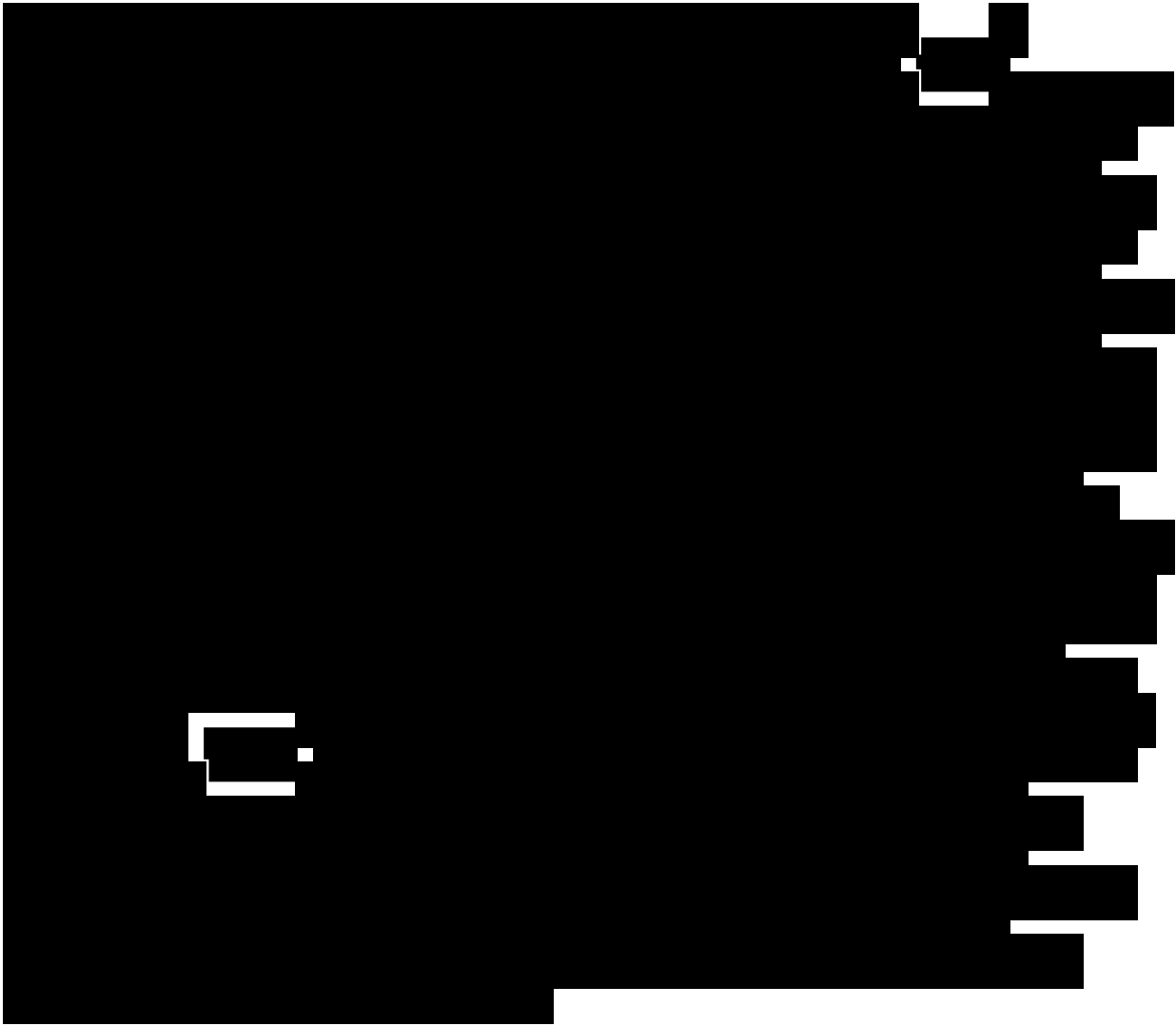
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[REDACTED]

-----Original Message-----

From: [REDACTED]

Sent: Monday, March 15, 2004 11:29

To: [REDACTED] CAPT, [REDACTED]

Scott, CDR, DoD OGC; [REDACTED], LtCol, DoD OGC; [REDACTED]

LtCol, DoD OGC; [REDACTED] MAJ, DoD OGC; [REDACTED] CPT, DoD

OGC; [REDACTED], LT, DoD OGC; [REDACTED] Mr, DoD OGC;

[REDACTED] Mr, DoD OGC; [REDACTED], LtCol, DoD OGC

Cc: [REDACTED], CW3, DoD OGC; [REDACTED]

Robert, MAJ, DoD OGC; [REDACTED] PT, DoD OGC

Subject: Allegations of misconduct and
unprofessionalism against Chief Prosecutor

Importance: High

All:

Please read below.

[REDACTED] has made some serious allegations against me as the Chief Prosecutor---charges that, if true, mandate that I be relieved of my duties.

Among other things, [REDACTED] insists that an "environment of dishonesty, secrecy, and deceit" exists within the entire office.

In an email preceding [REDACTED] you will note that [REDACTED] voices similar views: he states that he is "disgusted" with the "lack of vision" and "lack of integrity" in the office, and has "utter contempt" for many of the judge advocates serving with us.

Bottom line: Both [REDACTED] believe that what we are doing is so wrong that they cannot "morally, ethically, or professionally continue to be a part of this process."

I am convinced to the depth of my soul that all of us on the prosecution team are truly dedicated to the mission of the Office of Military Commissions---and that no one on the team has anything but the highest ethical principles. I am also convinced that what we are doing is critical to the Nation's on-going war on terrorism, that what we have done in the past---and will continue to do in the future---is truly the "right" thing, and that the allegations contained in these emails are monstrous lies.

It saddens me greatly that two judge advocates---whom I like very much and for whom I have only the greatest respect and admiration---think otherwise. In fairness to all of you, however, it is important that you read what has been written about me and you.

[REDACTED]

-----Original Message-----

From: [REDACTED] CPT, DoD OGC
Sent: Monday, March 15, 2004 07:56
To: [REDACTED] COL, DoD OGC
Cc: [REDACTED] MAJ, DoD OGC; [REDACTED],
[REDACTED] CAPT, DoD OGC; [REDACTED], CPT, DoD OGC
Subject: RE: Meeting with Colonel Borch and

myself, 4:00 p.m. today, [REDACTED] office

Sir,

I appreciated the opportunity to meet last Thursday night, as well as the frankness of the discussion. The topics covered and the comments made have been replaying in my mind since we ended the meeting. I have also reviewed Maj Preston's comments in his e-mail below, and I agree with them in every respect.

I feel a responsibility to emphasize a few issues. I do not think that our current troubles in the office stem from a clash of personalities. It would be a simple, common, and easily remedied situation to correct if this were true. People could be reassigned or removed.

It is my opinion that our problems are much more fundamental. Our cases are not even close to being adequately investigated or prepared for trial. This has been openly admitted privately within the office. There are many reasons why we find ourselves in this unfortunate and uncomfortable position - the starkest being that we have had little to no leadership or direction for the last eight months. It appears that instead of pausing, conducting an honest appraisal of our current preparation, and formulating an adequate prosecution plan for the future, we have invested substantial time and effort to conceal our deficiencies and mislead not only each other, but also those outside our office either directly responsible for, or asked to endorse, our efforts. My fears are not insignificant that the inadequate preparation of the cases and misrepresentation related thereto may constitute dereliction of duty, false official statements, or other criminal conduct.

An environment of secrecy, deceit and dishonesty exists within our office. This environment appears to have been passively allowed to flourish, if it has not been actively encouraged. The examples are many, but a few include:

1. [REDACTED] misrepresentations at the Mock Trial. [REDACTED] made many misrepresentations at the Mock Trial, to include stating that we had no reason to believe that al Bahlul had suffered any mistreatment or torture. When I confronted him immediately after the mock trial with his notes to the contrary, he admitted that he was aware of abuse allegations related specifically to al Bahlul. Interestingly, it was because of Prof. [REDACTED] comments at the mock trial that we even began to inquire into the conditions at the detention camps in AF, which prior to the mock trial had been consciously ignored. Other troubling aspects of the mock trial include, but are not limited to: statements that we would be ready for trial in 3 days, that al Bahlul has maintained from day one that he is a member of AQ, the deliberate and misleading presentation of select statements from al Bahlul, the careful coordination of the schedule to limit meaningful questions, the conscious inclusion of an overwhelming amount of paper in the notebooks, and the refusal to include a proof analysis.

2. Suppressing FBI Allegations of Abuse at Bagram - Over dinner and drinks, KK and Lt [REDACTED] heard from FBI agents

that detainees were being abused at the Bagram detention facility. Lt [REDACTED] told KK after dinner that they couldn't report the allegations because it was told to them "in confidence." KK to [REDACTED] LtCol [REDACTED] and [REDACTED] anyway, and all three stated that there was not credible evidence and concluded on their own volition that they should not report the allegation to you or other members of the office. Interestingly, [REDACTED] recently suggested the Lt [REDACTED], despite his lack of experience and judgment, be sent to review the CID reports of abuse at Bagram.

3. Refusal to give Mr. Haynes the COLE video -

Mr. Haynes asked CDR [REDACTED] twice for a copy of the COLE video. I heard CDR [REDACTED] ask [REDACTED] whether she should take a copy of the video over to Mr. Haynes. [REDACTED] told her not to, and that maybe in a few days Mr. Haynes would forget that he asked for it.

4. The disappearance/destruction of evidence -

As I have detailed to you, my copy of [REDACTED] notes detailing the 302 in which al Bahlul claims torture and abuse is now missing from my notebook. The 302 can not be located. Additionally, [REDACTED] of the FBI related last week that he called and spoke to [REDACTED] about the systematic destruction of statements of the detainees, and [REDACTED] said that this did not raise any issues.

5. "I've known about this for a year."

Hamden's name is on the UN 1267 list, and we only learned of it in Dec. When [REDACTED] was confronted with this information, he claimed that he had known about it for the last year. No attempt had been made prior to Dec to discover upon what evidence Hamdan was added to the list, and we still don't know. If he was aware of this fact, one is left to wonder why no inquiry was made with the State Department. He made the same "I've known about this for a year" claim about the Tiger Team AQ 101 brief, although he has had many of us searching for the information contained within it for months.

6. [REDACTED] misrepresentations at the office

overview of his case. As detailed in a previous e-mail to you, [REDACTED] made numerous misrepresentations concerning his case at the office meeting to discuss his case, indicating that he either consciously lied to the office, or does not know the facts of his case after 18 months of working on it.

I have discussed each of these specific examples with you, and you told me that you had taken corrective action to some. For example, in reference to paragraph 2, I asked how I was suppose to trust these attorneys to review documents and highlight exculpatory evidence and you responded that "when the time comes" you would put out very direct guidance. I do not believe that ethical behavior is something that can be directed during selective time periods.

These examples are well known to the members of this office, yet there has been no public rebuke of the behaviors. Hence, the environment and behaviors continue to flourish. I am left to wonder why at an office meeting we were not told:

"I understand that misrepresentations are being

made concerning the facts of our cases. If I find out this happens again, the responsible party is going to be fired."

"I understand that evidence is being withheld from our civilian leadership.. If I find out this happens again, someone is going to be fired."

"I understand that allegations of abuse are not being brought to my attention or reported to the appropriate authorities. If I find out this happens again, someone is going to be fired."

"I understand that evidence is being hidden or destroyed. If I find out this happens again, someone is going to be fired."

Even in regards to [REDACTED] recent behavior towards [REDACTED] and myself, the office was not told the real reason for why he has been removed as the deputy, only further feeding the underlying animosity and indicating that the action was forced upon you and not really justified - if not, surely you would have taken a less conciliatory stance.

You stated in our meeting last week that what else can you do but lead by example.

In regard to this environment of secrecy, deceit and dishonesty, the attorneys in this office appear to merely be following the example that you have set.

A few examples include:

You continue to make statements to the office that you admit in private are not true. With many of the issues listed here, the modus operandi appears to be for you to make a statement at a meeting, pause, and when no one states a disagreement, assume that everyone is in agreement. To the listener, it is clear that the statements are not true, but we are not to correct, disagree, or question you in front of the office. (For example, when I asked you basic questions concerning conspiracy law at an office briefing [REDACTED] called me into his office and told me that my conduct was borderline disrespectful because it put you in an uncomfortable position.)

You have stated for months that we are ready to go immediately with the first four cases. At the same time, e-mails are being sent out admitting that we don't have the evidence to prove the general conspiracy, let alone the specific accused's culpability. In fact, it may be questioned how we are in a better position to prove the general conspiracy today than we were last November at the mock trial. Of course, it should also be noted that we have substantially changed course even since November and now acknowledge that the plan to prove

principal liability for TANBOM, KENBOM, COLE and PENTBOM was misguided to say the least.

We are rushing to put 9 more RTBs together for cases that you admit are not even close to being ready to go trial. We are also being pressed to prepare charge sheets, and you have asked that discovery letter go out on these cases. We are led to believe that representations are being made are that these cases can be prosecuted in short order, when this simply is not true.

You told the AF generals that we had no indication that al Bahlul had been tortured. It was after this statement, which [REDACTED] quietly allowed to go uncorrected, that I brought up [REDACTED] missing notes to the contrary. You admitted to me that you were aware that al Bahlul had made allegations of abuse.

In our meeting with OGA, they told us that the exculpatory information, if it existed, would be in the 10% that we will not get with our agreed upon searches. I again brought up the problem that this presents to us in the car on the way back from the meeting, and you told me that the rules were written in such a way as to not require that we conduct such thorough searches, and that we weren't going to worry about it.

You state in a morning meeting that al Bahlul has claimed "in every statement" that he was an AQ member. When I told you after the meeting that this was not true, you simply admitted that you hadn't read the statements but were relying on what [REDACTED] had told you. As I have detailed in another e-mail, it does not appear that [REDACTED] is even aware of how many statements al Bahlul has made, let alone conducted a thorough analysis.

When [REDACTED] raises concerns about him advising the AA given the potential appearance of partiality, you advised him not to stop giving advice, but to only give advice orally.

[REDACTED] has emphasized at morning meetings, with you in the office, that we do not need to be putting so many of our concerns in e-mails and that we can just come down and talk. Given the disparity between what is said in causal conversation and the statements made by our leadership in e-mails, it is understandable that we have relied more and more on written communications.

You have repeatedly said to the office that the military panel will be handpicked and will not acquit these detainees, and we only needed to worry about building a record for the review panel. In private you have went further and stated that we are really concerned with review by academicians 10 years from now, who will go back and pick the cases apart.

We continue to foster the impression that CITF is responsible for our troubles and lack of evidence, although we have learned in the last few weeks that we haven't even sat down with the case agents to figure out what evidence they have and how they have

gathered it. You acknowledged last week that we will not even try to fix the problems with CTF. What is perhaps most disturbing about the lack of progress by our investigative agents is that it does not appear we have ever adequately explained the deficiencies to the CTF leadership.

Our morning meetings, briefings, and group discussions are short and superficial - it could be argued designed to permit a claim that the office has discussed or debated a certain topic without permitting such meaningful discussions to actually take place. Two prosecutors were scheduled 15 minutes each to go over the facts of their case. Charge sheets are reviewed by the office the afternoon that they are to be taken over to the Deputy AA. The lay down on the general conspiracy is cursory and devoid of meaningful comments or suggestions. The fact that we did not approach the FBI for assistance prior to 17 Dec - a month after the mock trial - is not only indefensible, but an example of how this office and others have misled outsiders by pretending that interagency cooperation has been alive and well for some time, when in fact the opposite is true.

It is claimed that the Tiger Team didn't do "shit" when in fact many of the products (i.e., AQ 101 and the statement of predicate facts) that they put together almost two years ago closely mirror products that have taken us months to put together. In fact, even a cursory review of the Tiger Team materials we now have (after several efforts to get them were sharply rebuffed by our own staff) shows that the Tiger Team had articulated many of the obstacles we now face and had warned that if these obstacles were not removed that prosecutions could not succeed.

As part of this atmosphere that you fostered, [REDACTED] as publicly rebuked for bringing this issue to the group's attention and you specifically stated that you had reviewed the tiger team materials, there was little if any usable material in them, and that the demise of the tiger team had been the result of an unfortunate personality clash and nothing else. A review of the files shows otherwise.

From June to December, you were only present in the office for brief periods, often less than 4 hours every two weeks. However, you continued to insist that [REDACTED] spoke for you and directed those who e-mailed you with concerns to address them with [REDACTED]. It is difficult to believe that his deficiencies were unknown at that time, and consequently it is difficult to believe that you were unaware of the fact that we had little to no direction during that time frame. The fact that he directed each of us in the office not to speak to you directly was, and remains to me, astonishing - but does permit one to argue that they were unaware of any difficulties during a critical period of this endeavor.

One justification for the concealment and minimization of the problems has been the often stated proposition that MG Altenburg will be able to remedy many of these problems when he becomes the Appointing Authority. However, you have recently stated that MG Altenburg is a good friend of yours, that you hope he will be heavily reliant on BG Hemingway for a period of time, and that we will not be forwarding any documentation of cases (e.g. proof analysis) to MG Altenburg which suggests that he will not be in a position to exercise independent judgment or oversight.

It is my opinion that the primary objective of the office has been the advancement of the process for personal motivations -- not the proper preparation of our cases or the interests of the American people.

The posturing of our prosecution team chiefs to maneuver onto the first case is overshadowed only by the zeal at which they hide from scrutiny or review the specific facts of their case - thereby assuring their participation.

The evidence does not indicate that our military and civilian leaders have been accurately informed of the state of our preparation, the true culpability of our accuseds, or the sustainability of our efforts.

I understand that part of the frustration with [REDACTED] discussions with BG Hemingway was that you did not have the opportunity to discuss the matters with him in the first instance. It was clear from the discussions with BG Hemingway that he was unaware of the lack of preparation with our cases prior to signing the charges, or many of the other problems that we have discussed.

You have stated that you are confident that if you told MG Altenburg that we needed more time that he would give it to you. Underlying this comment is the fact that MG Altenburg has not been made aware of the significant shortcomings of our cases and our lack of preparation and cooperation with outside agencies.

I also have significant reason to believe that Mr. Haynes has not been advised in the most accurate and precise way. It appears that even the results and critiques of the mock trial, described like so many other efforts in this office as a "home run," were manipulated to present the maximum appearance of endorsement (for example, the reorganization and bold-face in Lt Col [REDACTED] critique that was openly discussed in the office)

[REDACTED]

The comments we have heard in the office appear to revolve around one goal - to get the process advanced to the point that it can not be turned off. We are told that we just need to get defense counsel assigned, because then they can't stop the process and we can fix the problems. We just need to get charges approved because then they can't stop the process and then maybe we can fix the problems.

If the appropriate decisionmakers are provided accurate information and determine that we must go forward on the path we are currently on, then all would be very committed to accomplishing this task. However, it instead appears that the decisionmakers are being provided false information to get them to make the key decisions, to only learn the truth after a point of no return.

It is at least possible that the appropriate officials would be more concerned about approving charges, arraigning accuseds, and signing more RTBs prior to the arguments in front of the Supreme Court if they knew the true state of the cases and the position they will be left in this fall.

[It is also unclear how the steadfast refusal to have the prosecutors co-located with the CTF agents is in the interests of the American people or the preparation of the cases, and could be motivated by anything but a purely personal issue with someone involved in the process. You have admitted that both organizations productivity would be greatly increased.]

To address at least some of the underlying issues, the following may be proposed:

1. After fully informing the sages or invitees to the Mock Trial of the deficiencies we now acknowledge, solicit their recommendations and suggested courses of action.
2. Before MG Altenburg signs in -- taking on the AA responsibility and further damaging his lucrative private practice -- fully and accurately brief him on the status of our cases, our theories of liability, and the likely timetable in which we would be able to prepare cases after al Bahlul and al Qosi.
3. Fully and accurately brief Mr. Haynes and DOJ on the status of our cases, our theories of liability, and the likely timetable in which we would be able to prepare cases after al Bahlul and al Qosi.
4. Take immediate action within the office to develop a comprehensive prosecution strategy.
5. Take immediate action within the office to establish an environment that fosters openness, honesty, and ethical behavior.
6. Replace current prosecutors with senior experienced trial litigators capable of maintaining objectivity while zealously preparing for trial.

Instead, what I fear the reaction to [REDACTED] and my concerns will simply be a greater effort to make sure that we are walled off from the damaging information - as we are aware has been attempted in the past.

I would like to conclude with the following --
when I volunteered to assist with this process and was assigned to this office, I expected there would at least be a minimal effort to establish a fair process and diligently prepare cases against significant accused. Instead, I find a half-hearted and disorganized effort by a skeleton group of relatively inexperienced attorneys to prosecute fairly low-level accused in a process that appears to be rigged. It is difficult to believe that the White House has approved this situation, and I fully expect that one day, soon, someone will be called to answer for what our office has been doing for the last 14 months.

I echo [REDACTED] belief that I can not morally, ethically, or professionally continue to be a part of this process. While many may simply be concerned with a moment of fame and the ability in the future to engage in a small-time practice, that is neither what I aspire to do, nor what I have been trained to do. It will be expected that I should have been aware of the shortcomings with this endeavor, and that I reacted accordingly.

v/r,

[REDACTED]

-----Original Message-----

From: [REDACTED] DoD OGC
Sent: Thursday, March 11, 2004 16:19
To: [REDACTED] CAPT, DoD OGC
Cc: [REDACTED] DoD OGC
Subject: RE: Meeting with [REDACTED] and myself, 4:00 p.m. today [REDACTED] office

Ma'am

While I appreciate the sentiment, I have to tell you that I don't see a lot of use continuing to talk about this stuff, unless your looking at reassigning us out of this office. I don't intend to speak for [REDACTED] although I know he feels the same way, but for me I sincerely believe that this process is wrongly managed, wrongly focused and a blight on the reputation of the armed forces. I don't have anything new to say. I am pretty sure that everyone in the world knows my sentiments about this office and this process.

Certainly there have been some unfortunate symptomatic issues like [REDACTED] recently heightened animosity towards [REDACTED] and I'm not going to let that one go either), but my fundamental

concerns here have nothing to do with personality conflicts or intellectual disagreements.

I don't think that anyone really understands what our mission is, but whatever we are doing here is not an appropriate mission. I consider the insistence on pressing ahead with cases that would be marginal even if properly prepared to be a severe threat to the reputation of the Military Justice System and even a fraud on the American people - surely they don't expect that this fairly half-assed effort is all that we have been able to put together after all this time.

At the same time, my frank impression of my colleagues is that they are minimizing and/or concealing the problems we are facing and the potential embarrassment of the Armed Forces (and the people of the United States) either because they are afraid to admit mistakes, feel powerless to fix things, or because they are more concerned with their own reputations than they are with doing the right thing. Whether I am right or wrong about that, my utter contempt for most of them makes it impossible for me to work effectively.

Frankly, I became disgusted with the lack of vision and in my view the lack of integrity long ago and I no longer want to be part of the process - my mindset is such that I don't believe that I can effectively participate - professionally, ethically, or morally.

I lie awake worrying about this every night. I find it almost impossible to focus on my part of the mission - after all, writing a motion saying that the process will be full and fair when you don't really believe it will be is kind of hard - particularly when you want to call yourself an officer and a lawyer. This assignment is quite literally ruining my life.

I really see no way to fix this situation other than reassignment. I don't want to be an obstacle to anyone, but I'm not going to go along with things that I think are wrong - and I think this is wrong. It's not like I'm going to change my opinion in order to "go along with the program." I'm only going to persist in doing what I think is right and at some point that is going to lead to even harder feelings. Half the office thinks we are traitors anyway and frankly I think they are gutless, simple-minded, self-serving, some, or all of the above so you can see how that's going to go...

I know even well-meaning people get tired of hearing this, but the fact is that I really can't stomach doing this and I really don't want to waste time talking about it.

PS [REDACTED] not back yet. I think he was at FBI this afternoon.

-----Original Message-----

From: [REDACTED] CAPT, DoD OGC
Sent: Thursday, March 11, 2004 13:36

To: [REDACTED] MAJ, DoD OGC; Carr, John,
CPT, DoD OGC
Cc: [REDACTED] COL, DoD OGC
Subject: Meeting with [REDACTED] and myself,
4:00 p.m. today, Col [REDACTED]

[REDACTED],

[REDACTED] and I had a long talk this morning.

Based on his expressions of concern for some unresolved issues,
including both ethical matters and person

Memorandum for Record

Subject: RMC 802 Conference - 21 February 2008

1. At the request of the government, an RMC 802 conference was held by telephone from 1500-1525 hours, 21 February 2008.
2. Participating were:
 - a. COL Brownback
 - b. MCTJ - LTC Chappell, LTC Sowder
 - c. Defense - LCDR Kuebler, Ms. Snyder
 - d. Government - MAJ Groharing, CPT Petty, Mr. Oldham, Mr. Murphy
3. The conference was initially requested by the government based upon D-024 - a defense request for a continuance - which was submitted on 19 February 2008. The conference was further focused on D-025 - a defense discovery motion. [While D-024 was received on 19 February 2008, the motion itself was dated 15 January 2008. LCDR Kuebler stated that the date on the motion was a typographical error.] D-025 generated an email from LTC Chappell, on 20 February at 3:29, Subject: Discovery Motions - Khadr, in which the military judge established a NLT date for discovery motions. That 20 February email brought an email from LCDR Keubler, on 21 February at 11:55, Subject: Special Request for Relief - Discovery Motion - US v. Khadr. The government response to D-024 was received by the commission and parties 2:38 on February 21, 2008.
4. MAJ Groharing stated that he was concerned that D-024 would throw off the established trial date - his concern was also evident in his response to D-024. He requested the RMC 802 conference to find out what other justifications the defense has for moving the trial date. The military judge stated that he would allow the defense to respond to D-024 in writing rather than during the RMC 802 conference.
5. LCDR Kuebler recognized that a delay in the proceedings would indeed delay the established trial date. He voiced his objection to comments made in the government response to D-024.
6. The military judge stated that he was not going to rule on D-024 at this time.
7. The military judge stated that he was looking prospectively rather than retrospectively. He noted that the parties had been in Guantanamo with the military judge and an empty courtroom on the afternoon of 4 February and all day 5 February. The issues raised by D-024 were generally addressed in an RMC 802 conference at Guantanamo, but the discovery issues raised in D-025 and in LCDR Kuebler's email of 11:55, 21 February, were not presented to him by either party.
8. LCDR Kuebler set forth his view on the efforts that the defense has made in filing and litigating the law motions and is making to resolve discovery issues. Those efforts were related in his 21 February email. LCDR Kuebler explained that the defense had litigated fifteen motions with one-third of the government's resources. LCDR Kuebler also explained that the defense

had attempted to meet with the government to discuss discovery issues before filing discovery motions that discussions with the government could have rendered unnecessary, but that the government was unwilling to meet with the defense.

9. The military judge stated that he was not assigning blame to either party - except perhaps to himself. He urged the government to review their response to the defense discovery request to determine what discovery they could provide. He urged the defense to review the discovery request to identify what items of discovery it needs.

10. The military judge stated that the parties would meet in Guantanamo on 13 March 2008 and the discovery issues would be resolved then. He noted, in response to LCDR Kuebler's concern about future issues, that he was not precluding future discovery requests - however, the twelve or so motions to which LCDR Kuebler alluded in his 21 February 2008 email were certainly ripe for resolution. The military judge further stated that he would send an email establishing the session and setting out what would be covered at the session.

11. The military judge recognized that preparing the discovery issues in the time allotted might not allow for full and formal briefing. He pointed out that counsel could give notice of motion type identification - the discovery item in question, the need for it, the attempt to resolve it.

12. Both parties were asked if they had any significant obstruction to being in Guantanamo on 13 March. Neither party did.

3. The military judge stated that he would prepare a summary of the RMC 802 conference and coordinate with Ms. Snyder on it. Both sides agreed to have Ms. Snyder serve as the initial review person.

14. This summary was approved by counsel for both sides before it was adopted by the military judge. *See* Email, Ms. Snyder, 22 February 2008, 5:01 PM, Subject: Fw: KHADR Draft - RMC 802 Conference Summary - 21 February 2008.

Peter E. Brownback III
COL, JA, USA
Military Judge
1710 hours, 22 February 2008

Distribution: All Conference Participants

[REDACTED]

From: Petty, Keith, CPT, DoD OGC
Sent: Thursday, February 28, 2008 6:36 PM
To: [REDACTED]

Subject: Re: D-025 - Defense Motion to Compel Discovery (Eyewitnesses) - U.S. v. Khadr
Signed By: PETTY.KEITH.AARON.1265907322

Sir,

1. The Government, consistent with the Military Judge's suggestion at the 21 FEB 08 RMC 802 conference, is looking closely at the current Defense Discovery request.
2. The Government notes that the Defense in D-025 is requesting information that has in large part already been provided to the Defense by the Government.
3. The Government notes that in D-025 the Defense does not, with any degree of specificity, indicate which "eyewitnesses" it is referring to, thereby making the Government's task more difficult.
4. Notwithstanding the lack of specificity in the Defense request, the Government is in the process of putting together a list of contact information of "eyewitnesses" currently in the possession of the Prosecution. Although not conceding that it is required, once assembled, this list will be forwarded to the Defense.

V/r,

Keith A. Petty
Captain, U.S. Army
Prosecutor

[REDACTED] ns

[REDACTED] . v. Khadr - Defense Motion to Compel Discovery (Eyewitnesses)

LtCol [REDACTED]

1. Please find for filing with the commission in the case of US v. Khadr the attached defense motion to compel discovery.

V/r

Ms. Snyder

Rebecca S. Snyder

Attorney

Office of Military Commissions

[REDACTED] nsel

[REDACTED]

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13 March 2008

The following is a summary of an RMC 802 conference held at 1730 hours, 12 March 2008, at Guantanamo Bay, Cuba.

1. The following were present:

- a. The Military Judge, COL Peter Brownback
- b. Government Counsel, CPT Petty, Mr. John Murphy
- c. Defense Counsel, LCDR Kuebler, Ms. Rebecca Snyder, SSG Rebekah Stuyvesant

2. The parties discussed the status of each of the discovery issues raised in motions and notice of motions D025 through D038. Regarding D025, MTC (eyewitnesses), the prosecution stated that it was in the process of fine tuning a list of eyewitnesses present at the 27 July 2002 firefight that it will give the defense tomorrow. Initially, the prosecution stated that the list was prepared by searching the files of the trial counsel, case investigator, CITF case agent and case paralegal. The prosecution later clarified that it has obtained information from OGAs in preparing this list. The prosecution stated that the defense will not necessarily get the names of each eyewitness, but that the defense will be given a means to speak with each eyewitness.

3. Regarding D026, MTC (documents relating to Charge III) the parties have not reached an agreement on this motion. The government was unsure whether it could obtain the documents referenced in Attachment A to D026. The military judge directed the government to determine whether it could obtain those documents.

4. Regarding D027, MTC (documents regarding investigation & prosecution of Sgt []), the government stated that it intended to comply with the defense discovery request.

5. Regarding D028, Motion to Depose LtCol W, the parties have not reached an agreement on this motion. The military judge asked the defense why the defense believes it entitled to depose LtCol W. The defense explained that the information sought from LtCol W will impact further discovery in the case and is vital to reconstruct the events as one or two of the three reports he wrote were compiled immediately after the 27 July firefight and are based on LtCol W's interviews of many witnesses. The defense explained it wanted to ask LtCol W who those witnesses were so that it could attempt to talk to them prior to trial. The defense also explained that it wanted to explore what led to LtCol W altering and apparently backdating the last report. The prosecution stated that while it could not guarantee that LtCol W would not deploy and be unavailable at trial, it did not think that was likely and it intended to call him as a witness. In responding to a question from the military judge, the prosecution stated that it would prefer to not be able to admit LtCol W's statements at trial if he were not available to testify than for the defense to depose him prior to trial.

6. Regarding D029, MTC (accused's statements), the government stated that summaries of additional statements were forthcoming. It explained that it could not find the first several statements the defense specified in its motion. The government also explained that it has handwritten notes (in short-hand) containing the accused's statements that it has not produced to the defense because it has determined that they are not relevant or material.

7. Regarding D030, MTC (documents relating to investigation of Col Davis complaint), the parties have not reached an agreement on this motion. The military judge told the defense to review the Tate document available on the DoD website. In response to the military judge, the government explained that it could make the requested documents available to the defense.

8. Regarding D031, NOM (physical evidence), the government stated that it has done a thorough search and has not located any physical evidence that the defense does not have.

9. Regarding D032, NOM (documents regarding capture & detention), the defense clarified that it is requesting documents such as message traffic, casualty reports, and incident reports. The military judge directed the government to determine what unit or units and US elements were involved in the firefight, and whether there was an after action or other report of activity prepared by any of them. The military judge also instructed the government to search for relevant message traffic from 27-30 July 2002.

10. Regarding D033, NOM (communications between US & Canada), the government explained that it had a search performed for the requested documents at the State Department because it thought this agency was the most likely to contain relevant documents and that none were found. The defense explained that there must be some communications because something caused Canada to generate the response attached to D033 as Attachment A. The defense suggested that the communications might have been through US intelligence agencies rather than the State Department. The government then explained that it had conducted a search at other agencies as well and did not find the requested documents.

11. Regarding D034, MTC (documents regarding investigation of detainee abuse in Bagram), the government explained that it is going to produce documents in connection with D027, which should be sufficient. The defense explained that at least 27 people in one unit had been investigated for detainee abuse at Bagram so the documents relating to D027 may not be sufficient to satisfy the document request at issue in D034. The government was unsure of the scope of the investigation relating to D027 and thought that it might have been one large detainee abuse investigation, rather than multiple investigations, and said that it would check on that.

12. Regarding D035, NOM (interrogators), the government explained that it has given the defense all the names of the accused's interrogators. The defense explained that it has numbers, not names, for many of the interrogators, and that there are interrogators who are not identified in the many of the interview summaries, interrogation reports, etc. The defense also explained that it had just become aware of one potential interrogator through a recent newspaper article that was not contained in the discovery. The government explained that it would look further into what had been done to identify the accused's interrogators.

13. Regarding D036, NOM (SOPs & interrogation manuals), in Major Groharing's absence, Capt Petty was unsure of whether these items had been looked for and stated he would check.

14. Regarding D037, NOM (videos, audio recordings, photos of accused), the government stated that it was aware of only one video the defense did not have and it was working to obtain authorization to produce it to the defense. The defense stated that many photos of the accused had been taken, many of them in connection with medical care, and asked whether the government had them. It

stated it did not, but that it was unsure of whether the medical records contained those photos. The government explained that both the defense and government have done everything that is required to obtain the medical records, but that JTF had just informed Capt Petty and LCDR Kuebler that it would not release the medical records without authorization from the defense that JTF could give the records to the prosecution. The government also explained that it doesn't know whether the medical records JTF has include medical records from Bagram or other sources because JTF had not yet responded to the government question as to the scope of the records.

15. Regarding D038, NOM (classified report), the government stated that it will produce to the defense an unclassified summary of the report shortly.

16. The defense explained that it had submitted two supplemental discovery requests to the government, and the government explained that it submitted a discovery request to the defense. The military judge emphasized that he wanted to resolve the discovery issues and encouraged the parties to discuss the requests.

17. The parties discussed several administrative issues, including displaying attachments to the motions on the video screens in the courtroom, referencing attachments, publishing motions and responses on the DoD website.

18. The defense also told the military judge that it may be necessary to have a closed session in the event that it needed to discuss information contained in the classified documents attached to the motions. The military judge stated that the defense should refer to the information by paragraph and that there would be no need to have a closed session.

19. The defense explained that the convening authority had requested more information before deciding whether to grant the defense request for an expert consultant relating to al Qaeda. In the event the request is denied, the defense will need to litigate the expert request. The defense stated that if the convening authority denies the expert request, then the defense will file a motion to continue the deadline for responding to P003 as expert assistance is needed to respond.

20. The defense noted that the government's complaints in responding to the D024 (defense motion for to continue evidentiary motions deadline) that the defense has spent time going TAD rather than preparing for trial raises a question of whether counsel is competent since the government alleges they are not preparing for trial. The government responded that its response says the defense is competent and that it was not raising this ethical issue.

21. Any issues requiring a decision were withheld until the hearing tomorrow. The MJ urged both parties to talk to each other about discovery issues and try to resolve them amongst themselves. The military judge also urged both parties to come up with a trial schedule. Neither party had anything further.

22. This summary was agreed to by defense counsel and government counsel before it was signed by the military judge.

Peter E. Brownback III
COL, JA, USA
Military Judge

14 March 2008

The following is a summary of an RMC 802 conference held at 1825 hours, 13 March 2008, at Guantanamo Bay, Cuba.

1. The following were present:

- a. The Military Judge, COL Peter Brownback
- b. Government Counsel, MAJ Groharing, CPT Petty, Mr. John Murphy, SSG Ona
- c. Defense Counsel, LCDR Kuebler, Ms. Rebecca Snyder, SSG Rebekah Stuyvesant

2. The military judge reviewed each motion again to ensure that each side understood which motions he intended to rule on. Regarding D025, MTC (eyewitnesses) the military judge will not rule at this point. The prosecution is in the process of fine tuning a list of eyewitnesses present at the 27 July 2002 firefight that it will give the defense. The prosecution will provide names of people, but may not be able to provide units or contact information on some of the personnel.

3. Regarding D026, MTC (documents relating to Charge III), the military judge will not rule at this point. The prosecution is working on trying to obtain the conspiracy documents.

4. Regarding D027, MTC (documents regarding investigation & prosecution of Sgt []), the military judge will not rule at this point. The government stated that it intended to comply with the defense discovery request.

5. Regarding D028, motion to depose LtCol W, the military judge will rule by tomorrow.

6. Regarding D029, MTC (accused's statements), the military judge will rule by tomorrow.

7. Regarding D030, MTC (documents relating to the investigation of Col Davis complaint), the military judge will rule by tomorrow.

8. Regarding D031, NOM (physical evidence), the military judge will not rule at this point because the government says that it does not have any physical evidence not produced to the defense.

9. Regarding D032, NOM (documents regarding capture & detention), the military judge will not rule on the motion at this point. But the military judge instructed the government to comply with what was put on the record at the hearing today regarding searching for message traffic, etc. The search should cover 27 July - 8 August 2002.

10. Regarding D033, NOM (communications between US & Canada), the military judge will not rule at this point. The government must comply with what was put on the record when searching for communications with Canada. The search should cover 27 July through 31 December 2002.

11. Regarding D034, MTC (documents regarding investigation of detainee abuse in Bagram), the military judge will not rule at this point. The government

explained that it is going to produce documents in connection with D027 and that D027 is subsumed by D034.

12. Regarding D035, NOM (identity of interrogators), the military judge will rule by tomorrow.

13. Regarding D036, NOM (SOPs & Manuals), the military judge will not rule at this point. The government must look for any SOPs & interrogation manuals, other than the SOP mentioned in conjunction with D034/D027.

14. Regarding D037, NOM (videos, audio recordings, photos of accused), the military judge will not rule at this point.

15. Regarding D038, NOM (classified report), the military judge will not rule at this point since the government will provide to the defense an unclassified summary of the report shortly.

16. Regarding D024, defense motion for continuance of evidentiary motions deadline, the military judge will rule by tomorrow.

17. The government will provide the defense with the medical records tomorrow, 14 March 2008.

18. The military judge explained that the defense can raise further issues with the military judge if the defense is not satisfied with the documents produced by the government.

19. The government raised an issue regarding the release of filings. It said that it appears that the defense is releasing their filings before they are filed with the Court. The defense explained that it had the understanding that it could discuss the contents of their filings with people outside the defense team prior to the court releasing the filing to the public as long as it did not divulge FOUO information. The military judge stated that he is troubled with a motion being released before it reaches military judge's hands. But the military judge explained the defense may call up the press and let them know a motion would be sent out the next day regarding XYZ and that it thinks it is entitled to the requested relief because of abc.

20. This summary was agreed to by defense counsel and government counsel before it was signed by the military judge.

Peter E. Brownback III
COL, JA, USA
Military Judge

12 April 2008

Subject: Summary - RMC 802 Conference - 10 April 2008

The following is a summary of an RMC 802 conference held at 1000 hours, 10 April 2008, at Guantanamo Bay, Cuba.

1. The following were present:

- a. The Military Judge, COL Peter Brownback
- b. Government Counsel, Maj Jeff Groharing, CPT Keith Petty, Mr. John Murphy, SSG Guadalupe Ona
- c. Defense Counsel, LCDR Bill Kuebler, Ms. Rebecca Snyder, SSG Rebekah Stuyvesant

2. The parties discussed the status of each of the outstanding discovery issues raised and/or litigated at the hearing on 13 March 2008, supplemental defense discovery requests, as well as the motions and notice of motions filed by the defense since the last hearing.

3. Regarding D025, MTC (eyewitnesses), the prosecution has provided the defense a partial list of soldiers present in the vicinity of the firefight resulting in the accused's capture. The prosecution has requested additional information from each unit present at the firefight and will provide any updates we receive.

4. Regarding D050, Notice of Motion (Reports from other Special Operations Units), and D032 (Motion to Compel Documents re Capture & Detention), which subsumes D050, the government stated it has been able to locate a few additional documents related to the firefight and will provide them after appropriate redactions are made. The government has requested all units present to review their files as well as CENTCOM. Several units have advised the government that they do not have any responsive documents. The Government expects a comprehensive response from CENTCOM in the near future. The government stated that military units were not required to conduct death investigations for combat deaths until post-Tillman. The military judge suggested the government contact the "HRC" or like organization to attempt to find a "casualty report" related to SFC Chris Speer's death. Resolution of this discovery issue is still pending.

5. Regarding D026, MTC (documents relating to Charge III), at the March hearing the military judge directed the prosecution to determine whether it could obtain the requested documents. The prosecution has obtained them and does not intend to produce them because they are accurately summarized in the 9/11 Report. The government also contends they are not relevant because whether the alleged co-conspirator disagreed with the tactics of al Qaeda is irrelevant to whether there was an al Qaeda conspiracy. The defense explained that evidence that the individuals with whom Mr. Khadr is alleged to have conspired did not agree that particular attacks should be carried out is relevant. Resolution of this discovery issue is still pending. In response to the military judge's question regarding what the government can prove up in light of the dismissal of language from the conspiracy charge due to the Commission's ruling on D019, the prosecution responded that they intended to show an al Qaeda conspiracy was formed to accomplish certain objectives, that the organization is a conspiracy, that the

accused joined the conspiracy that was already existing in order to do the types of things al Qaeda had previously done. The prosecution explained that their proof would include evidence regarding the 9/11 attacks, the USS COLE Bombing, the embassy attacks, etc., and that this evidence goes to the accused's knowledge of what he joined. In response to the military judge questioning what the 9/11 attacks have to do with the accused since he is alleged to have joined the conspiracy in June 2002, the prosecution explained that it shows that the accused knew what kinds of things al Qaeda did when he joined the conspiracy. The defense stated that the government's proffer suggests that it still intends to prove liability based on a criminal enterprise theory; but the government must show a specific agreement to commit certain object offenses, which makes the documents even more relevant after the military judge's ruling on D019. The defense explained that it has established more than a baseline of materiality regarding the documents. Resolution of this discovery issue is still pending.

6. Regarding D027, MTC (Sgt C Docs), and D034 MTC (Bagram Abuse Investigation), the government produced 5132 pages to the defense on 3 April, which are all but a few subparts of the investigation. The defense will review the documents and notify the commission if there are any additional issues relating to these motions.

7. Regarding D029, MTC (Khadr's Statements), the government has produced three unclassified summaries approved by the Military Judge following an MCRE 505 hearing. The government intends to produce four more documents. There will be a summary produced in lieu of classified information for another one of those documents after an MCRE 505 hearing, which will have to be held sometime after this week. Resolution of this discovery issue is still pending.

8. Regarding D030, MTC (Docs re Davis Investigation), the government filed a motion to reconsider which will be addressed on the record tomorrow.

9. Regarding D031, Notice of Motion (Physical Evidence), the prosecution has learned that the original video found at the compound is located in an evidence locker at JTF. The prosecution was also advised that an English Bible that was purportedly found at the scene of the firefight is also located in the evidence locker. The prosecution will make this evidence available to the defense. Resolution of this discovery issue is still pending.

10. Regarding D033, Notice of Motion (US-Canadian Correspondence), State department has found some relevant documents, which the prosecution will look at next week. Resolution of this discovery issue is still pending. The defense counsel noted that the Canadian Government representative present for the hearing stated that Canada has documents relevant to the case and wants to know what level of protection the documents should receive if released to defense counsel pursuant to the Canadian litigation in Mr. Khadr's case. Resolution of this discovery issue is still pending.

11. Regarding D035, Notice of Motion (Interrogators ID), the government intends to file a motion to reconsider.

12. Regarding D036, MTC (Manuals & SOPs), the government has numerous manuals and SOPs (approximately 675 pages) in effect during the time periods that the accused was interrogated. The government will continue to gather all manuals and SOPs that would have been in effect during interrogations of the accused.

13. Regarding D048, Notice of Motion (SERE SOP), the government said that it did not intend to produce this document because it was never adopted as policy, so it is not relevant. There is also an additional interrogation manual the government has reviewed and does not intend to produce. Resolution of this discovery issue is still pending.

14. Regarding D037, Notice of Motion (Videos, Audio, Photos), the government can only find one video, which is the video of the Canadian interrogation. It is in the process of making a copy of this video for the defense. The government did not locate any photos or videos taken in connection with changing the accused's bandages in Bagram or during medical exams. Resolution of this discovery issue is still pending.

15. Regarding D038, Notice of Motion (Classified Report), the government has produced an unclassified summary to the defense.

16. Regarding D041, MTC ([REDACTED] Documents), the prosecution has an MCRE 505 filing for the military judge today that relates to this motion. It is a declaration that says the documents the defense seeks do not contain derogatory information. The defense explained that it also requested information relating to [REDACTED]'s training and experience. The government stated that [REDACTED] has agreed to speak to the defense and that he would answer some questions about this, but may be limited in what he can say. The defense explained that because [REDACTED] had an incentive to describe his training and experience in such a way as to make his conclusions regarding who threw the grenade credible, it was important to be able to independently verify [REDACTED]'s claims regarding his training and experience. The military judge stated the defense could raise this issue after talking to [REDACTED].

17. Regarding D042, MTC (Intelligence Reports re Compound), the prosecution stated the defense has all the written intelligence reports that they have been able to locate after making requests of all appropriate USG agencies. It intends to produce an unclassified summary of classified information regarding the intelligence that led U.S. forces to the compound where the accused was captured after a protective order is entered regarding this document. Resolution of this discovery issue is still pending.

18. Regarding D043, MTC (DIMS), the prosecution is in the process of gathering the information. Resolution of this discovery issue is still pending.

19. Regarding D044, MTC (Various Individuals), the defense filed the motion on 7 April 2008, so the government is not yet prepared to respond. The government will respond in writing. Resolution of this discovery issue is still pending.

20. Regarding D045, Notice of Motion (al Qaeda membership lists), the defense filed it on 7 April 2008, so the government is not yet prepared

to respond. The government will respond in writing. Resolution of this discovery issue is still pending.

21. Regarding D046, Notice of Motion (Identity of Co-conspirators), the defense filed it on 7 April 2008, so the government is not yet prepared to respond. The government will respond in writing. Resolution of this discovery issue is still pending.

22. Regarding D047, Special Request for Relief to Strike Additional Language from Charge III based on the ruling for D019 and filed on 9 April 2008, the government will respond in writing. Resolution of this discovery issue is still pending.

23. Regarding D049, MTC (LIFG), the government stated that the request was overbroad, the defense had not described how the requested documents would material to the preparation of the defense and that it would respond in writing. Resolution of this discovery issue is still pending.

24. Regarding D051, Notice of Motion (Recruitment of Child Soldiers), the defense filed it on 9 April 2008, so the government is not yet prepared to respond. The government will respond in writing. Resolution of this discovery issue is still pending.

25. Regarding D052, Notice of Motion (SOPs re Minors), the government stated that it is expending tremendous resources looking for documents. The defense explained that if the government has detained and treated the accused in a manner that does not comply with applicable SOPs, that fact is admissible as mitigating evidence for sentencing. The military judge stated that he would give the prosecution an opportunity to respond in writing.

26. Regarding D053, Notice of Motion (Investigator Notes), the prosecution stated that there is no reason to produce the notes since they are incorporated in the Form 40s. The military judge stated that the prosecution could respond in writing.

27. The defense inquired as to whether the Notices of Motion would become part of the record and made publicly available. The military judge said that they would be. The military judge invited the defense to let him know for which motions or notices of motions the parties had completed the filings that had not yet been released.

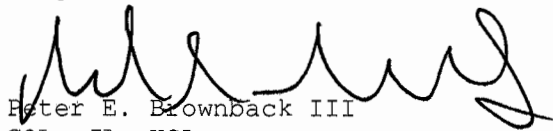
28. The defense asked if the temperature in the courtroom could be raised because counsel and the client were extremely cold during the last hearing. The military judge asked Capt Petty to handle the issue.

29. The defense noted that after the last hearing, discovery materials were taken from the client's box where his commissions legal materials are kept. When he asked for the documents, he was brought an empty box. The defense explained that the detainees are allowed to have access to habeas legal materials without transport, but to see commissions legal materials they must be transported and shackled. The prosecution explained that they had been told about a stamping policy whereby legal materials could be marked as such, but that stamping legal materials was not required. The defense also explained that the JTF intended to implement a policy that all notes taken during client

meetings are classified, but that there was no mechanism to "declassify" the notes. The military judge asked Capt Petty to obtain a copy of the stamping policy, the classification of notes policy, and the policy as to what documents can be reviewed where. Captain Petty asked the defense to approach him regarding any problems they are having related to meeting with their client or preparing a defense.

30. The defense stated that it intended to file another discovery motion in which it would seek documents relating to the principle of *tu quoque*.

31. This summary was agreed to by defense counsel (on 11 April) and government counsel (on 12 April) before it was signed by the military judge.

A handwritten signature in black ink, appearing to read "Peter E. Brownback III". The signature is fluid and cursive, with a large, stylized initial "P" and a long, sweeping underline.

Peter E. Brownback III
COL, JA, USA
Military Judge

CF: All attendees.

The following is a summary of an RMC 802 conference held at 1700 hours, 7 May 2008, at Guantanamo Bay, Cuba.

1. The following were present:

- a. The Military Judge, COL Peter Brownback
- b. Government Counsel, Maj Jeff Groharing, CPT Keith Petty, SSG Guadalupe Ona
- c. Defense Counsel, LCDR Bill Kuebler, Ms. Rebecca Snyder, Mr. Nathan Whitling, SSG Rebekah Stuyvesant
- d. Col Parrish was present, but did not participate in the conference

2. The parties discussed the status of each of the outstanding discovery motions and notice of motions filed by the defense.

3. Regarding D025, MTC (eyewitnesses), the prosecution has provided an updated list identifying individuals who were present at the firefight resulting in the accused's capture. The Government is not going to search for additional information absent a specific defense request demonstrating how locating a particular individual is necessary. The government has previously provided statements for eight additional individuals not listed on the list provided to the Defense. If the defense wishes to speak to these witness, it must notify the government.

4. Regarding D029, MTC (Mr. Khadr's statements), the defense explained that the government has produced approximately 144 unclassified summaries of interrogations of Mr. Khadr. The government allowed the defense to review notes for 59 unclassified interrogation summaries pursuant to the military judge's order. The defense explained that no handwritten notes have been provided for the first 30 interrogation summaries. The government explained that the interrogation summaries from Bagram are considered to be notes even though they are typewritten. The government has asked CENTCOM for handwritten notes from interrogations, has received some negative replies and is waiting to receive the rest of the replies.

5. Regarding D031, Notice of Motion (Physical Evidence), the government has not located any more physical evidence. The original bomb-making video is located in GTMO, but can't be played here because it is 8mm film. The flag is located in Crystal City and the Bible is located at Ft Belvoir.

6. Regarding D032, Notice of Motion (Docs regarding capture & detention), the government intends to produce additional reports and documents from the other special operations group next week.

7. Regarding D033, Notice of Motion (US-Canadian Correspondence), the government explained that Mr. Murphy completed reviewing the documents at the State Department on Friday that it will disclose to the defense next week. Initially, the government asked for documents regarding the accused and the 27 July 2002 firefight and the State Department provided a small number of documents related to the accused, which the government determined were not discoverable to the defense. After the March session, the government asked the State Department to search for documents containing communications between Canada and the U.S. during the relevant period. They produced documents that Mr. Murphy reviewed last week. The government said the State Department has a number of documents regarding the accused's father that the government does not intend to produce. The defense stated that this was the first time they had heard the State Department has such documents and that the defense requested

documents relating to Ahmed Said Khadr, the accused's father and an alleged co-conspirator, in November 2007 in connection with Charge III. The defense also explained that documents regarding Ahmed Said Khadr and his connections to al Qaeda and those alleged to be involved with al Qaeda may be relevant evidence in mitigation.

8. The military judge issued a classified protective order regarding D035, Notice of Motion (identification of interrogators), today.

9. Regarding D036, MTC (Manuals & SOPs), the government does not intend to produce any more manuals or SOPs.

10. Regarding D037, MTC (video, audio, photos), the government has allowed the defense to view the DVDs of Mr. Khadr's interrogations. The government is attempting to improve the sound on one of the DVDs as was done for other DVDs. The defense asked whether the DVDs will be declassified once the interrogators' faces are covered up and explained that the content of the interrogations exists in unclassified documents. The defense stated that it would like to show the DVDs to an expert. The government stated that it would try to declassify them or obtain permission for an expert to view them.

11. D038, MTC (classified report), is complete.

12. Regarding D041, MTC (documents relating to OC1), the defense will review the motion in light of protective order number 4.

13. Regarding D042, MTC (intel reports), the defense will review the motion in light of protective order number 4.

14. Regarding D043, MTC (DIMS), the government agrees that portions of the DIMS reports are relevant and asked the Defense to narrow their request. The defense was viewed two binders of DIMS and flagged the pages they needed in one of the binders. For the other binder, the Defense explained that the nature of the documents and inability to compare them to their files at their office makes reviewing the documents away from their office difficult and time consuming. The government advised that the JTF has not authorized release of the documents to the Defense without redactions to names of guards and other information.

15. The defense requested oral argument on D044, D045, D046, D048, D049, D050, D051, and D053. Neither the defense nor government desires to argue D047.

16. Regarding D052, MTC (US SOPs re treatment of children), the government will produce one CENTCOM document to the defense and JTF is still looking for responsive documents. In light of this, the parties do not intend to argue this motion tomorrow.

17. Regarding D054, MTC (BTIF inspection), MAJ [REDACTED] completed the BTIF tour. The government has received 8 - 10 class [REDACTED]s from BTIF personnel that according to BTIF personnel, don't bear any resemblance to the BTIF as it looked when the accused was there. The government will allow the defense to view the documents. The military judge considers D054 to be complete and that the defense should inform the judge if there is anything further on this motion.

18. Regarding D055, Motion to Amend Charge IV, the parties intend to argue it tomorrow. The prosecution filed a response that the military judge did not receive. The government will ensure it is sent to the military judge.

19. Regarding MJ012, Brief regarding the Relevance of Pre-June 2002 Activities, the military judge has received five documents that are briefs, responses, and replies that are still being reviewed.

20. The defense made the military judge aware that they submitted a supplemental discovery request to the government earlier this week based on discovery the defense has received in the last few weeks.

21. The defense explained to the military judge that they have been interviewing child experts and psychologists. The defense does not have any experience with juvenile justice issues and believes it would be more efficient to bring on a civilian attorney with juvenile justice experience than for the defense to take the time necessary to become competent to litigate juvenile related issues. The defense are currently working through funding for the civilian attorney issues, but wanted to give the judge notice that a new counsel may be at the next hearing.

22. The military judge stated that he will set a date for evidentiary motions to be due on 28 May 08, but if more time is needed and/or it is necessary to incorporate outstanding discovery issues, the parties should ask for relief.

23. The military judge stated that he will set the evidentiary motions hearing for 18-19 June 08.

24. The government requested the military judge issue a trial date.

25. The Defense objected to issuance of a trial date.

26. This summary was agreed to by defense counsel and government counsel before it was signed by the military judge.

Peter E. Brownback III
COL, JA, USA
Military Judge
8 May 2008

Khadr - Motions Status Summary a/o 9 May 2008
V2 after RMC 802 Conference at 0830

Includes information from Filings Inventory, RMC 802 Conferences, and Transcripts

P-001 Complete
P-002 Complete
P-003 Pending – a) CA action on witness request, b) MJ ruling on MJ-012
P-004 Complete
P-005 Complete
P-006 Complete

D-001 Complete
D-002 Complete
D-003 Complete
D-004 Complete
D-005 Complete
D-006 Complete
D-007 Complete
D-008 Complete
D-009 Complete
D-010 Complete
D-011 Complete
D-012 Complete
D-013 Complete
D-014 Complete
D-015 Complete
D-016 Complete
D-017 Complete
D-018 Complete
D-019 Complete
D-020 Complete
D-021 Complete
D-022 Complete
D-023 Complete
D-024 Complete

D-025 Action complete. If DC want more, they will make a new request. MJ will file a determination in the matter.

D-026 Complete

D-027 Action complete. If DC want more, they will make a new request. MJ will file a determination in the matter.

D-028 Complete

D-029 TC waiting for final confirmation from CENTCOM that no subordinate units/agencies have any other notes. Once received, TC will advise DC.

D-030 Complete

D-031 Action complete. If DC want more, they will make a new request. MJ will file a determination.

D-032 Government still working on finding post-action reports. Gov't looking for casualty reports. This motion subsumes D-050. ROT 11 Apr 08. **Gov't believes that some report will be declassified next week. ROT 8 May.**

D-033 Government was to review DOS documents week of 15 April. ROT 11 Apr 08. **Mr. Murphy has completed review and should get documents next week. TC will advise DC of what documents it is not providing. TC stated some documents re Khadr's father – DC demanded research on them. TC will search and advise. ROT 8 May 08.**

D-034 This motion is subsumed by D-027. ROT 11 Apr 08. **Action complete. If DC want more they will make a new request. MJ will file a determination in the matter.**

D-035 MJ issued ruling. Government email dated 2 April 2008 said it was going to file motion to reconsider. Still not received. ROT 11 Apr 08. **Government will file a classified request for reconsideration in Gitmo o/a 6 May – TC – 30 Apr. TC filed classified request for reconsideration 6 May, not signed. MJ signed revised order 7 May. Action complete.**

D-036 Government is still searching for Manuals and SOPs. ROT 11 Apr 08. **Parties still discussing OGA manuals. TC/DC talk re submitting written interrogatories thru TC to OGA re certain techniques. ROT 8 May.**

D-037 Government trying (a/o 11 Apr) to make copy of one video for DC. Government did not locate any other videos or photos. ROT 11 Apr 08. **Still tech problems with face changing on tape. Plus TC, at DC request, trying to get video declassified if tech problem solved. ROT 8 May.**

D-038 Government gave unclassified version of report. DC will advise if it wants more. ROT 11 Apr 08. **Action complete. MJ will file a determination in the matter.**

D-039 Complete

D-040 Complete

D-041 No action by MJ until DC reviews in light of Pro Ord #4. ROT 11 Apr 08. **DC still reviewing in light of Pro Ord #4. ROT 8 May.**

D-042 No action by MJ until DC reviews in light of Pro Ord #4. ROT 11 Apr 08. **DC still reviewing in light of Pro Ord #4. ROT 8 May.**

D-043 No response from government. Will one be furnished? ROT 11 Apr 08. DC - 27 Apr 08 indicates that gov't has provided discovery. Problems with means of discovery. TC - 30 Apr - will work w/DC w/in constraints of maintaining control of documents. **Problem mutated. MJ issued oral ruling, will issue final ruling in writing. Ruling include furnishing DIMS Binder 2 by 22 May 1700 hours. TC will discuss with JTF need to cooperate w/information requests or face lengthy delay in trial. ROT 8 May.**

D-044 Response filed. a) Does DC want to reply? No - DC 29 Apr. b) Does either side want further oral argument? Yes - DC 30 Apr. **Both sides argued this motion w/D-049. MJ will issue ruling. ROT 8 May.**

D-045 Response filed. a) Does DC want to reply? No - DC 29 Apr. b) Does either side want further oral argument? Yes - DC 30 Apr. **Both sides argued. MJ will issue ruling. ROT 8 May.**

D-046 Response filed. a) Does DC want to reply? No - DC 29 Apr. b) Does either side want further oral argument? Yes - DC 30 Apr. **Both sides argued. MJ will issue ruling. ROT 8 May.**

D-047 Response filed. a) Does DC want to reply? No - DC 29 Apr. b) Does either side want further oral argument? No - DC 29 Apr. **With MJ for decision.**

D-048 Response filed. a) Does DC want to reply? No - DC 29 Apr. b) Does either side want further oral argument? Yes - DC 30 Apr. **Both sides argued. MJ will issue ruling. ROT 8 May.**

D-049 Response filed. a) Does DC want to reply? No - DC 29 Apr. b) Does either side want further oral argument? Yes - DC 30 Apr. **Both sides argued this motion w/D-044. MJ will issue ruling. ROT 8 May.**

D-050 This motion is subsumed by D-032. ROT 11 Apr 08.

D-051 Response filed. a) Does DC want to reply? No - DC 29 Apr. b) Does either side want further oral argument? Yes - DC 30 Apr. **Both sides argued. MJ will issue ruling. ROT 8 May.**

D-052 No response received. Does either side want oral argument? Yes - DC 30 Apr. Government working to find documents - TC 30 Apr. **No argument. TC has found at least two documents. Still searching. ROT 8 May.**

D-053 Response filed. a) Does DC want to reply? No – DC 29 Apr. b) Does either side want further oral argument? Yes – DC 30 Apr. **Both sides argued. MJ will issue ruling. ROT 8 May.**

D-054 Complete.

D-055 Motion filed. Response **received. Both sides argued. MJ will issue ruling. ROT 8 May.**

MJ-001 Complete

MJ-002 Complete

MJ-003 Complete

MJ-004 Complete

MJ-005 Complete

MJ-006 Complete

MJ-007 Complete

MJ-008 Complete

MJ-009 With MJ for decisions on trial schedule. **MJ set certain dates on the record. Will supplement with formal ruling. Both sides argued. ROT 8 May.**

MJ-010 Complete

MJ-011 Complete

MJ-012 Parties have submitted briefs, **responses to briefs, and DC reply to response. MJ declined to hear argument on motion on 8 May.**

[REDACTED]

From: Kuebler, William, LCDR, DoD OGC
Sent: Wednesday, March 05, 2008 4:17 PM
To: [REDACTED] DoD OGC
Cc: [REDACTED]

Subject: Notice of defense intent WRT D-025

Sir,

1. The government has not filed a responsive pleading in connection with D-025.
2. The defense does not therefore intend to file a reply brief in connection with this matter.

VR,

LCDR Kuebler

[REDACTED]

From:
Sent:
To:

[REDACTED]
Friday, May 09, 2008 3:02 PM
[REDACTED]

Subject: US v Khadr - Determination and Ruling - D-025

Attachments: D-025 - Determination and Ruling.pdf

[REDACTED]
D-025 -
etermination and Ru

COL Brownback has directed that the attached materials be forwarded to counsel in US v Khadr and other interested persons.

V/r,

-----O

From:
Sent:
To:
Subj

[REDACTED],

Please forward the attached determination and ruling in D-025 to counsel in the case of United States v. Khadr. Please distribute it to other interested persons.

COL Brownback

**UNITED STATES
OF
AMERICA**

D-027
Defense Motion To Compel Discovery (Documents
Relating to Investigation and Prosecution of Sgt
[REDACTED] USA)

9 May 2008

v

OMAR AHMED KHADR
a/k/a “Akhbar Farhad”
a/k/a “Akhbar Farnad”
a/k/a “Ahmed Muhammed Khahi”

Determination and Ruling

1. The defense filed this motion on 4 March 2008. The government sent an email on 10 March 2008 stating that it intended to comply with the discovery request. At an RMC 802 conference on 12 March, on the record on 13 March, and at an RMC 802 conference on 13 March, the government reiterated that it was in the process of complying with the discovery request. At an RMC 802 conference on 10 April, the government stated that it had furnished almost all of the discovery. On the record on 11 April, the defense stated that it was in the process of reviewing the matters provided and would advise the prosecution and the commission if it was not satisfied. The matter was not raised at an RMC 802 conference on 6 May or on the record on 7 May. In the Motion Status Summary, distributed to the parties on 9 May 2008, D-027 carried the notation : “Action complete, If DC want more, they will make a new request. MJ will file a determination in the matter.”
2. Documents discussed in paragraph 1 will be contained in the Appellate Exhibit which contains this motion.
3. The commission determines that the government has satisfied the requirements of RMC 701 in connection with this motion. Any further requests by the defense in connection with the subject of this motion will be made in the context of a new discovery request.
4. The commission rules that action by the parties and the commission on this motion is now Final.

Peter E. Brownback III
COL, JA, USA
Military Judge

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

**Defense Motion
To Compel Discovery**

(Documents Relating to Investigation and
Prosecution of [REDACTED], USA)

4 March 2008

1. **Timeliness:** This motion is filed within the timeframe established by the Military Commission Trial Judiciary Rules of Court and the Military Judge's email order of 21 February 2008.

2. **Relief Sought:** The defense respectfully requests that this Commission order the government to produce the requested discovery: all materials within the possession, custody or control of the government relating to the investigation and prosecution of Sgt [REDACTED] (USA), which relate to his abuse and mistreatment of detainees, including the record of trial from his court-martial.

3. **Overview:**

a. The defense seeks production of information relating to [REDACTED] whom the government has described as a "key government witness" who interrogated Mr. Khadr "on numerous occasions" from August through October 2002 in Bagram, Afghanistan. [REDACTED] was convicted of mistreating detainees from October 2002 through February 2003, which led to the death of a detainee detained in Bagram, Afghanistan in December 2002, at the same facility where Mr. Khadr was being held. The government claims that because Sgt Claus is not on the government's current witness list, the government need not provide discovery relating to [REDACTED] treatment of detainees.

b. Under Military Commission Rule of Evidence (M.C.R.E.) 304(a)(1) statements elicited through torture are not admissible. Under M.C.R.E. 304(c)(1), statements obtained before December 30, 2005, that were obtained through coercion are not admissible if they are unreliable or the interests of justice would not best be served by their admission. In examining whether a statement admitted through coercion should be admissible the commission considers the totality of circumstances. M.C.R.E. 304(c), discussion. Mr. Khadr has a right to discovery of evidence that would give grounds for challenging the admissibility of his statements and that are otherwise material to the preparation of the defense.

c. The requested records are material for several reasons. First, they are material to whether or not Mr. Khadr's statements are admissible under the evidentiary rules. Second, they are material for the purpose of developing additional corroborating evidence regarding [REDACTED]

[REDACTED]. Third, they are relevant for the purpose of impeachment should [REDACTED] testify against Mr. Khadr or should the government introduce any statements

from [REDACTED] against Mr. Khadr. Fourth, any mistreatment Mr. Khadr suffered in the hands of prison guards or interrogators in the early days of his detention is relevant to the determination of whether coercion existed in later interrogations due to a fear of further physical abuse. Fifth, the requested documents will likely corroborate Mr. Khadr's knowledge of the mistreatment of other detainees by guards and interrogators, which gives rise to a coercive environment and affects the reliability of his statements. Finally, even if Mr. Khadr's alleged inculpatory statements are not suppressed, the requested discovery is material to Mr. Khadr's ability to demonstrate to the factfinder that his statements are not reliable; evidence corroborating that Mr. Khadr made inculpatory statements under duress undercuts the reliability of those statements. The alleged inculpatory statements made by Mr. Khadr are a key part of the government's case-in-chief, particularly given that there are no eyewitnesses who saw Mr. Khadr throw the grenade that allegedly killed Sgt Speer. The requested documents meet the minimal standard for production of being "helpful to the defense of [the] accused." Indeed, they are key to the defense's ability to test the government's case and to the factfinders' ability to weigh the evidence. Thus, documents relating to the investigation and prosecution of [REDACTED] for detainee abuse and mistreatment must be disclosed under Rules for Military Commission (R.M.C.) 701(c)(1) and (e)(1).

4. Burden of Proof: The defense bears the burden of establishing, by a preponderance of the evidence, that it is entitled to the requested relief. R.M.C. 905(c)(2)(A). The defense, however, need not show by a preponderance of the evidence that the requested discovery is material. *See generally, Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (On review, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.").

5. Facts:

a. On 9 November 2007, the defense submitted to the government a request for discovery that sought, among other items, the following: "All materials within the possession, custody and control of the government relating to the investigation and prosecution of [REDACTED] (Def. Discovery Req. of 9 Nov 07, ¶ 3(c)) (Attachment D to D-025 Defense Motion to Compel Discovery (Eyewitnesses)). The government responded that: "Mr. [REDACTED] is not included on the government witness list and any matters related to his prosecution for unrelated acts are not relevant to the prosecution of the accused." (Govt Resp. of 4 Dec 07 to Def. Discovery Req., ¶ 3(c)) (Attachment E to D-025, Defense Motion to Compel Discovery (Eyewitnesses)).

b. Sgt [REDACTED] was convicted of maltreatment of unknown persons under U.S. control between on or about 1 October 2002 and on or about 1 February 2003, in violation of Article 93, UCMJ, 10 U.S.C. § 893, while he was stationed at Bagram Airbase, Afghanistan. Dept of the Army Report of Results of Trial *ICO United States v. Claus* at 1 (Bates No. 00766-001436) [hereinafter *Claus Results of Trial*] (Attachment A). Sgt [REDACTED] was also convicted of assaulting a detainee named [REDACTED] by forcing water down his throat, grabbing him and pulling him across an interrogation table, and twisting a bag or hood tightly over the detainee's head on or about 9 December 2002. *Id.* at 1-2. This detainee died from physical abuse in December 2002. Tim Golden, *In U.S. Report, Brutal Details Of 2 Afghan Inmates' Deaths*, N.Y. TIMES, May 20, 2005, at A1 (Attachment B). The government has not disclosed Sgt [REDACTED] adjudged sentence.

However, the convening authority disapproved adjudged confinement in excess of one year.
[REDACTED] Results of Trial at 1.

c. While imprisoned at Bagram Air Base, Mr. Khadr was interrogated by Sgt [REDACTED] “on numerous occasions” in August through October 2002. Maj Groharing Memo of 1 May 06 re Clemency Request ICO [REDACTED] ¶ 3 (Bates No. 00766-000832) [hereinafter Groharing Memo] (Attachment C); Col Davis Memo of 18 Nov 05 re Request for Grant of Immunity – [REDACTED] ¶ 3 (Bates No. 00766-001430) [hereinafter Davis Memo] (Attachment D). The government, however, has disclosed to the defense only one occasion where [REDACTED] was present during an interrogation of Mr. Khadr. *See* Agent’s Investigation Report No. T-157 of 16 Sep 02 at 2 (Bates No. 00766-000105) (Attachment E). The period for which [REDACTED] was convicted of abusing detainees (October 2002 to February 2003) overlaps the period during which he interrogated Mr. Khadr (August through October 2002).

d. [REDACTED] initially refused to speak to the prosecutors in this case about his interrogations of Mr. Khadr. Davis Memo ¶ 4. He was later granted testimonial immunity protecting him from prosecution for any UCMJ offenses he may have committed against Mr. Khadr would be revealed to prosecutors in discussing his interrogations of Mr. Khadr. BGen Lennox Memo of 15 Dec 05 re Grant of Immunity and Order to Testify ¶ 3 (Bates No. 00766-000831) (Attachment F). In exchange for the immunity, Sgt Claus was also ordered to testify against Mr. Khadr should the prosecution call him as a witness. *Id.* ¶ 2.

e. In a letter requesting clemency for [REDACTED] from his court-martial sentence, Major Groharing characterized Sgt Claus as a “key government witness in the case of U.S. v. Khadr.” Groharing Memo ¶ 2; *see also* Prosecution Witness List of 31 Jan 06, ¶ 31 (Attachment G) (listing [REDACTED] as a prosecution witness to be called at trial).

6. Argument:

a. The M.C.A., R.M.C., Regulations for Trial by Military Commission, the Due Process Clause and International Law Require Disclosure of Documents Relating to the Investigation and Prosecution of [REDACTED] for Detainee Abuse that Overlapped The Period During Which Sgt Claus Interrogated Mr. Khadr on “Numerous Occasions”

(1) The M.C.A. and Rules and Regulations Governing Military Commissions Require Disclosure

(i) The M.C.A. states that “Defense counsel in a military commission under this chapter shall have a reasonable opportunity to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense.” *See* 10 U.S.C. § 949j. The rules and regulation echo the statute. *See* R.M.C. 703(a) (“The defense shall have reasonable opportunity to obtain witnesses and other evidence as provided in these rules.”); Regulation for Trial by Military Commissions 17-2(a) (“Pursuant to 10 U.S.C. § 949j, the defense counsel in a military commission shall have a reasonable opportunity to obtain witnesses and other evidence as provided by R.M.C. 701-703, and Mil. Comm. R. Evid. 505.”).

(ii) R.M.C. 701(c)(1) requires the government to permit the defense to examine documents and things “within the possession, custody, or control of the Government, the existence of which is known or by the exercise of due diligence may become known to trial counsel, and *which are material to the preparation of the defense* or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial.” (Emphasis added). The Discussion accompanying R.M.C. 701(c) instructs the military commission judges to look to *United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989), which applied Federal Rule of Criminal Procedure 16¹ governing discovery in the context of the Classified Information Procedures Act (CIPA), for the proper materiality standard. In *Yunis*, the court ruled that the defendant was entitled to “information [that] is at least ‘helpful to the defense of [the] accused.’” *Id.* at 623 (quoting *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957)); *see also United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1993) (“materiality standard is not a heavy burden”) (internal quotations omitted); *United States v. Gaddis*, 877 F.2d 605, 611 (7th Cir.1989) (defining material evidence as evidence that would “significantly help [] in ‘uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment and rebuttal’”) (quoting *United States v. Felt*, 491 F.Supp. 179, 186 (D.D.C. 1979)). Thus, the materiality standard set forth in R.M.C. 701(c) requires the prosecution to turn over any information that is “at least helpful to the defense.” In addition, R.M.C. 701(e)(1) requires the government to disclose “the existence of evidence known to the trial counsel which reasonably tends to ... [n]egate the guilt of the accused of an offense charged.”

(iii) The Military Commission Rules of Evidence (“M.C.R.E.”) explicitly acknowledge the materiality of records such as those Mr. Khadr requests. M.C.R.E. 304(a)(1) provides that “[a] statement obtained by use of torture shall not be admitted into evidence against any party or witness, except against a person accused of torture as evidence that the statement was made.” M.C.R.E. 304(c) similarly places restrictions on the admission of “statements allegedly produced by coercion,” providing in relevant part that:

When the degree of coercion inherent in the production of a statement offered by either party is disputed, such statement may only be admitted in accordance with this section.

(1) As to statements obtained before December 30, 2005, the military judge may admit the statement only if the military judge finds that (A) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and (B) the interests of justice would best be served by admission of the statement into evidence.

¹ The relevant portion of Federal Rule of Criminal Procedure 16 is nearly identical to R.M.C. 701(c)(1). It states: “Upon a defendant’s request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government’s possession, custody, or control and: (i) the item is material to preparing the defense.” Fed. R. Crim. Proc. 16(a)(1)(E)(i).

(2) As to statements obtained on or after December 30, 2005, the military judge may admit the statement only if the military judge finds that (A) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; (B) the interests of justice would best be served by admission of the statement into evidence; and (C) the interrogation methods used to obtain the statement do not amount to cruel, inhuman, or degrading treatment.

M.C.R.E. 304(c).

(iv) The requested records are material for several reasons. First, they are clearly material to whether or not Mr. Khadr's statements are admissible under the evidentiary rules. The requested discovery therefore is critical to the defense's ability to move for suppression of statements under M.C.R.E. 304(a)(1) or 304(c) on either the basis of torture or coercion resulting in unreliable statements. Indeed, the Discussion accompanying M.C.R.E. 304(c) explicitly provides that information such as that requested by the defense is material: "In evaluating whether [a statement made before December 30, 2005] is reliable and whether the admission of the statement is consistent with the interests of justice, the military judge may consider *all relevant circumstances, including the facts and circumstances surrounding the alleged coercion, as well as whether other evidence tends to corroborate or bring into question the reliability of the proffered statement.*" (Emphasis added).

(v) Second, they are material for the purpose of developing additional corroborating evidence regarding Mr. Khadr's claims of [REDACTED]

2

(vi) Third, they are relevant for the purpose of impeachment should Sgt [REDACTED] testify against Mr. Khadr or should the government introduce any statements from Sgt Claus against Mr. Khadr.³ See *United States v. Bagley*, 473 U.S. 667, 676 (1985) ("Impeachment evidence . . . as well as exculpatory evidence, falls within the *Brady* rule. Such evidence is 'evidence favorable to an accused,' so that, if disclosed and used effectively, it may make the difference between conviction and acquittal.") (citations omitted).

(vii) Fourth, any mistreatment Mr. Khadr may have suffered in the hands of prison guards or interrogators in the early days of his incarceration is also relevant to the determination whether coercion existed in later interrogations; Mr. Khadr would have no reason to doubt, during any interrogation, that the interrogators could again engage in physical abuse. See

² See generally Khadr Affidavit, 22 Feb 08 (Attachment H) (The government has not yet determined whether any portions of Mr. Khadr's affidavit are classified. Therefore, the defense has been instructed to redact all portions that could potentially be classified. The redacted copy is attached. An unredacted copy will be delivered to the Commission in Guantanamo Bay.)

³ The government has twice conceded that Sgt [REDACTED] is a material witness by stating that he is "a key witness in the case of U.S. v. Khadr", Groharing Memo ¶ 2, and by putting him on a witness list for this case in the previous military commission system, Prosecution Witness List of 31 Jan 06, ¶ 31. Sgt [REDACTED] does not appear on the government's current witness list.

Arizona v. Fulminante, 499 U.S. 279, 287 (1991) (recognizing confession can be involuntary as a result of psychological and physical coercion); *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960) (“[C]oercion can be mental as well as physical, and . . . the blood of the accused is not the only hallmark of an unconstitutional inquisition.”); *Columbe v. Connecticut*, 367 U.S. 568, 605-06 (1961) (“‘There is torture of mind as well as body; the will is as much affected by fear as by force. And there comes a point where this Court should not be ignorant as judges of what we know as men.’”) (quoting *Watts v. Indiana*, 338 U.S. 49, 52 (1949)).

(viii) Fifth, Mr. Khadr’s knowledge of the mistreatment of other detainees by guards and interrogators gives rise to a coercive environment and affects the reliability of his statements. See *Fulminante*, 499 U.S. at 287; *Blackburn*, 361 U.S. at 206; *Columbe*, 367 U.S. at 605-06 (quoting ██████████ 338 U.S. at 52). The requested documents will likely corroborate Mr. Khadr’s claims that he knew other detainees were mistreated and that this made him afraid of the interrogators.⁴

(ix) Finally, even if Mr. Khadr’s alleged inculpatory statements are not suppressed in this case, disclosure of the requested information will still be critical to the preparation of the defense case. The alleged inculpatory statements made by Mr. Khadr are a key part of the government’s case-in-chief, particularly given that there are no eyewitnesses who saw Mr. Khadr throw the grenade that allegedly killed Sgt Speer. Obviously, evidence corroborating that Mr. Khadr made inculpatory statements under duress tends to undercut the reliability of those statements. If his statements are admitted into evidence, it is essential that Mr. Khadr be able to develop and introduce evidence at trial to demonstrate to the factfinder that they are not reliable. Cf. *United States v. Graves*, 23 U.S.C.M.A. 434, 436 (C.M.A. 1975) (“[I]f the matter [voluntariness of a confession] is placed in issue before the jury, the Government must present evidence sufficient to establish, beyond a reasonable doubt, that the inculpatory statement was voluntary. Once the issue is raised, the military judge has a *sua sponte* duty to instruct the court members to reject the accused’s confession in toto if they are not satisfied, beyond a reasonable doubt, of the voluntariness of the statement.”). Such evidence may be developed by the defense during cross-examination or introduced during the defense case. And the documents Mr. Khadr seeks could help in uncovering evidence for use at trial. If the defense is not permitted to develop and introduce such evidence, the factfinder may place unwarranted weight on a putative “confession” that was obtained by coercion – perhaps even torture. If the defense is not permitted access to that evidence of coercion, it will be crippled in its ability to develop its case. And moreover, the factfinder will make decisions based on incomplete and one-sided information.

(x) One pervasive fact increasing the relevance of the requested discovery is the fact that Mr. Khadr was a minor at the time of his arrest (it is uncontested that he was 15 years old at the time); this increases the likelihood that mistreatment by interrogators and guards resulted in

⁴ “In Bagram, I would always hear people screaming, both day and night. Sometimes it would be the interrogators ██████████, and sometimes it was the prisoners screaming from their treatment. I know a lot of other detainees who were ██████████ by the skinny blonde guy. Most people would not talk about what had been done to them. This made me afraid.” Khadr Affidavit, ¶ 29.

unreliable statements. *See Colorado v. Connolly*, 479 U.S. 157, 164 (1986) (the mental condition of the defendant is a factor in determining whether the defendant's statement was coerced); *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982) ("[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage."); *cf. Schneckloth v. Bustamante*, 412 U.S. 218, 226 (1973) (applying a 'totality of the circumstances' test to determining voluntariness of a confession).

(xi) Another pervasive fact lowering the threshold for the type of treatment that may result in coercive or tortured statements is Mr. Khadr's medical condition at the time of his interrogations. Early in the firefight on 27 July 2002, Mr. Khadr suffered injuries to his eyes and other parts of his body. Khadr Affidavit, ¶¶ 3, 25. Shrapnel was embedded in his eyes. *Id.* And he was shot in the back at two or three times during the firefight, resulting in two cavernous exit wounds in his upper left chest large enough to see deep into his chest cavity. *See* Photos of Mr. Khadr 00766-000977, 001021 (Attachment I); Undated Document Titled IIR-6-034-0258-03, 00766-000194 (Khadr "was shot 3 times") (Attachment J). One soldier who participated in the firefight saw Mr. Khadr laying on the ground wounded and wrote in his journal that "[Khadr's] missing a piece of his chest and I can see his heart beating." Journal at 00766-001380 (Attachment K). Mr. Khadr's chest wounds were infected, swollen, and still seeping blood nearly seven months after the firefight, and Mr. Khadr was in the hospital receiving treatment for the gunshot wounds ten months after the firefight.⁵ The defense is unaware of how many surgeries Mr. Khadr endured or how long his injuries remained painful.⁶

(xii) There is no question that the requested records meet the minimal standard of being "helpful to the defense of [the] accused" and negate the government's case against Mr. Khadr. Indeed, they are key to the defense's ability to test the government's case and to the factfinders' ability to weigh the evidence. Mr. Khadr is entitled to the requested discovery not only as a matter of fundamental fairness, but also to ensure that the instant proceedings elicit the truth and provide a fair trial worthy of confidence. *Cf. Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (defining fair trial "as a trial resulting in a verdict worthy of confidence"); *Strickler v. Greene*, 527 U.S. 263, 290 (1999) (same). Therefore, documents relating to the investigation and prosecution of Sgt. [REDACTED] for detainee abuse and mistreatment must be disclosed under R.M.C. 701(c)(1) and (e)(1).

⁵ *See* Report of Investigative Activity of 3 June 03 at 1, 00766-000154 (Khadr was interrogated during a June 2003 hospitalization due to infections to his gunshot wounds and hospitalization was expected to last six more weeks) (Attachment L); Report of Investigative Activity of 12 Mar 2003 at 1, 00766-000151 (Attachment M) (Khadr was scheduled to have surgery on his chest wounds on 13 Mar 2003); Report of Investigative Activity of 20 Feb 03 at 1, 00766-000146 (Attachment N) (Khadr's wounds swelled to the point of bursting); Report of Investigative Activity of 17 Feb 03 at 2, 00766-000145 (Attachment O) (blood was seeping from Khadr's wounds); Report of Investigative Activity of 6 Jan 2003 at 2, Bates No. 00766-000140 (Attachment P) (Khadr complained to interrogators of pain from his chest and shoulder injuries).

⁶ The prosecution has represented to the defense that it is in the process of obtaining and producing Mr. Khadr's medical records.

(2) The Due Process Clause & MCA § 949j(d)(2) Require Disclosure

(i) The disclosure requirement under the R.M.C. 701(c) echoes a fundamental principle of U.S. law: The government's failure to disclose "evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment" *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The government's duty to disclose such evidence encompasses exculpatory evidence, including impeachment evidence. *United States v. Bagley*, 473 U.S. 667, 675 (1985) (impeachment evidence falls within *Brady* rule); *United States v. Mahoney*, 58 M.J. 346, 349 (C.A.A.F. 2003) (characterizing impeachment evidence as exculpatory evidence). Such evidence is "material" "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 682. "The message of *Brady* and its progeny is that a trial is not a mere 'sporting event'; it is a quest for truth in which the prosecutor, by virtue of his office, must seek truth even as he seeks victory." *Monroe v. Blackburn*, 476 U.S. 1145, 1148 (1986); *see also Bagley*, 473 U.S. at 675 ("The *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur.").

(ii) The MCA makes *Brady*, at least with respect to exculpatory evidence, applicable to military commissions. *See* 10 U.S.C. § 949j(d)(2). Section 949j(d)(2) of the MCA states that the prosecution must disclose exculpatory evidence that it "would be required to disclose in a trial by general court-martial." *Brady* governs disclosure of exculpatory evidence in general courts-martial. *Mahoney*, 58 M.J. at 349. Therefore, by virtue of MCA § 949j(d)(2), *Brady* applies to military commissions.⁷

⁷ The requested documents are also relevant to assess whether Mr. Khadr's statements violate his due process right not to be convicted on the basis of involuntary statements. *But see Boumediene v. Bush*, 476 F.3d 981 (2007), *cert. granted* 127 S. Ct. 3078 (2007). The use of coerced confessions – whether deemed otherwise reliable or not – as evidence to convict an accused violates due process. *See Lynum v. Illinois*, 372 U.S. 528, 534 (1963) (due process violated where coerced confession used at trial). "The ultimate test [with respect to the admissibility of confessions] remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker?" *Culombe*, 367 U.S. at 602. A court looks at the totality of the circumstances, including "the characteristics of the accused and the details of the interrogation," to determine whether the statement is voluntary. *Schneckloth*, 412 U.S. at 226 (establishing 'totality of the circumstances' test to determine voluntariness of a confession). The totality of circumstances encompasses psychological, as well as physical coercion as well-settled Supreme Court cases "have made clear that a finding of coercion need not depend upon actual violence by a government agent; a credible threat is sufficient." *Fulminante*, 499 U.S. at 287; *see also Culombe*, 367 U.S. at 605-06 (quoting *Watts v. Indiana* 338 U.S. 49, 52 (1949)); *Blackburn*, 361 U.S. at 206. To conform to seminal constitutional principles, therefore, any statements used against an accused must be the product of free will. *See Culombe*, 367 U.S. at 602.

(iii) The government intends to rely upon Mr. Khadr's allegedly inculpatory statement as evidence of his guilt. Because the requested records will likely corroborate the defense claim that Mr. Khadr's statements were obtained by coercion, they are likely "exculpatory" in nature, and there is a "reasonable probability" that the disclosure of this evidence will yield a different result in the instant proceedings. *Bagley*, 473 U.S. at 676, 682 ("A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."). If the defense is denied access to that information, then counsel will be hamstrung in its ability to investigate and prepare the defense case. As a result, Mr. Khadr could be convicted on the basis of a putative "confession" that is nothing more than a fabrication extracted under duress. This risk is of particular concern here, where there are no eye witnesses to the alleged facts forming the basis for the murder charge. Such an outcome would obviously prejudice Mr. Khadr's most fundamental rights, but would also pervert the cause of justice and fair process. *Brady* and its progeny – made applicable to military commissions by MCA § 949j(d)(2) – therefore require disclosure of the requested records, independent of R.M.C. 701(c)(1)'s broader discovery provision.

(3) International Law Requires Disclosure

(i) The Military Commissions Act (M.C.A.) and the Manual for Military Commissions (M.M.C.) incorporate the judicial safeguards of Common Article 3 of the Geneva Conventions. *See* 10 U.S.C. § 948(b)(f) ("A military commission established under this chapter is a regularly constituted court, affording all the necessary 'judicial guarantees which are recognized as indispensable by civilized peoples' for purposes of Common Article 3 of the Geneva Conventions.")⁸; R.M.C., Preamble (stating that the Manual for Military Commissions "provides procedural and evidentiary rules that [. . .] extend to the accused all the 'necessary judicial guarantees' as required by Common Article 3.") They must, therefore, be read in light of Common Article 3 and international law surrounding that provision.

(ii) The Geneva Convention Relative to the Treatment of Prisoners of War prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." *See* Geneva Convention, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, Common Article 3. The judicial safeguards required by Common

⁸ Whether military commissions, in fact, comply with Common Article 3 is ultimately a judicial question that Congress does not have the power to answer. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the *judicial department* to say what the law is.") (emphasis added). Any congressional attempt to legislative an answer to such a judicial question violates the bedrock separation of powers principle and has no legal effect. *See id.* at 176-77 ("The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written."). Because a statute should be construed to avoid constitutional problems unless doing so would be "plainly contrary" to the intent of the legislature, *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *see also Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936), the only reasonable interpretation is that § 948b(f) is that it requires military commissions to comply with Common Article 3.

Article 3 are delineated in article 75 of Protocol I to the Geneva Conventions of 1949.⁹ Article 75(a) provides that the procedures for trial “shall afford the accused before and during his trial all necessary rights and means of defense.”¹⁰

(iii) Read in light of international law principles, precedents applying the U.S. Constitution, the rules governing this Commission, and the government’s denial of the defense request for documents relating to the investigation and prosecution of Sgt [REDACTED] for abuse and mistreatment of detainees ignores fundamental concepts of fairness and places in question the integrity of these proceedings.

b. Denial of the Requested Documents Will Necessarily Result in Counsel Failing to Provide Competent Representation

(1) Failure to grant the defense access to the requested documents will deprive Mr. Khadr of competent representation by precluding the defense from inquiring into possible challenges to the voluntariness of his statements and possibly the ability to impeach government witnesses. *Cf. Smith v. Wainright*, 777 F.2d 609, 617 (5th Cir 1985) (discussing defense counsel failure to move for suppression of confession in assessing ineffective assistance of counsel claim). Governing military ethics rules require Mr. Khadr’s military counsel to provide “competent” representation. “Competent representation requires . . . access to evidence.” JAGINST 5803.1C (9 Nov 04). “[I]nvestigation is an essential component of the adversary process.” *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987) (quoting *Wade v. Armontrout*, 798 F.2d 304, 307 (8th Cir. 1986)). Thus, the adversarial process will not function properly if the defense counsel fails to investigate his client’s case or is denied access to evidence within the control of the government that is relevant to the investigation. *See id.* Here, the government’s view of what evidence is relevant and material to the preparation of the defense is so narrow as

⁹ *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 75, 1125 U.N.T.S. 3, *entered into force* Dec. 7, 1978 [hereinafter Additional Protocol]. The Protocol has not been ratified by the United States, but the U.S. government has acknowledged that Article 75 is customary international law. *See Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2797 (2006) (stating that the government “regard[s] the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled”). *See also* Memorandum from W. Hays Parks, Chief, International Law Branch, DAJA-IA, et. al., to Mr. John H. McNeill, Assistant General Counsel (International), OSD (8 May 1986) (stating art. 75 of Additional Protocol I is customary international law). The Supreme Court has also relied on the Additional Protocol in construing the meaning of Common Article 3 of the Geneva Conventions as applied to military commissions. *See Hamdan*, 126 S.Ct. at 2796.

¹⁰ The ICTY and the ICTR similarly provide “minimum guarantees” for the accused to “be entitled to a fair and . . . hearing.” Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, art. 21(2), U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), *adopted by* Security Council 25 May 1993, U.N. Doc. S/RES/827 (1993); Statute of the International Tribunal for Rwanda, art. 20(2), *adopted by* S.C. Res. 955, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598, 1600 (1994).

to necessarily cause defense counsel to fail to provide competent representation to Mr. Khadr. Accordingly, this Commission should order the government to produce the requested documents.

c. Conclusion

(1) The Supreme court has said “that the United States Attorney is ‘the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.’” *Strickler*, 537 U.S. at 281 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). When the prosecution reserves to itself the determination of what evidence ought be considered, it disregards its duty to seek justice, and usurps the role of the court, defense counsel and the trier of fact. *Cf. Brady*, 373 U.S. at 87-88, n.2. The integrity of these proceedings will be fatally undermined if the defense is not afforded the opportunity to independently investigate the factual allegations at issue in the case. At a minimum, this requires that the defense be given documents relating to the investigation and prosecution of Sgt [REDACTED] for detainee abuse and mistreatment that overlapped the period in which Sgt [REDACTED] interrogated Mr. Khadr on “numerous occasions”. The Commission should therefore order the government to produce all statements of Mr. Khadr.

7. Oral Argument: The defense requests oral argument as it is entitled to pursuant to R.M.C. 905(h), which provides that “Upon request, either party is entitled to an R.M.C. 803 session to present oral argument or have evidentiary hearing concerning the disposition of written motions.” Oral argument will allow for thorough consideration of the issues raised by this motion.

8. Witnesses & Evidence: The defense does not anticipate the need to call witnesses in connection with this motion, but reserves the right to do so should the prosecution’s response raise issues requiring rebuttal testimony. The defense relies on the following as evidence:

Defense Discovery Request of 9 November 07 (Attachment D to D-025 Defense Motion to Compel Discovery (Eyewitnesses))

Government Response of 4 December 07 to Defense Discovery Request of 9 November 2007 (Attachment E to D-025, Defense Motion to Compel Discovery (Eyewitnesses))

Attachments A through P

9. Conference: The defense has conferred with the prosecution regarding the requested relief. The prosecution objects to the requested relief.

10. Additional Information: In making this motion, or any other motion, Mr. Khadr does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this Military Commission to charge him, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in and all appropriate forms.

11. Attachments:

- A. Dept of the Army Report of Results of Trial ICO *United States v.* [REDACTED]
- B. Tim Golden, *In U.S. Report, Brutal Details Of 2 Afghan Inmates' Deaths*, N.Y. TIMES, May 20, 2005, at A1
- C. Mai Groharing Memo of 1 May 06 re Clemency Request ICO S [REDACTED]
[REDACTED]
- D. Col Davis Memo of 18 Nov 05 re Request for Grant of Immunity – S [REDACTED]
[REDACTED]
- E. Agent's Investigation Report No. T-157 of 16 Sep 02 at 2
- F. BGen Lennox Memo of 15 Dec 05 re Grant of Immunity and Order to Testify
- G. Prosecution Witness List of 31 Jan 06
- H. Khadr Affidavit, 22 Feb 08
- I. Photo of Mr. Khadr
- J. Undated Document Titled IIR-6-034-0258-03, 00766-000192-94
- K. Journal, 00766-001380
- L. Report of Investigative Activity of 3 June 03
- M. Report of Investigative Activity of 12 Mar 03
- N. Report of Investigative Activity of 20 Feb 03
- O. Report of Investigative Activity of 17 Feb 03
- P. Report of Investigative Activity of 6 Jan 03



William Kuebler
LCDR, USN
Detailed Defense Counsel

Rebecca S. Snyder
Assistant Detailed Defense Counsel

DEPARTMENT OF THE ARMY REPORT OF RESULTS OF TRIAL

For use of this form, see AR 27-10; the proponent agency is OTJAG

TO:

1. Notification under R.C.M. 1101 and AR 27-10, paragraph 5-30 is hereby given in the case of the United States v [REDACTED]
[REDACTED] Co A, 519th Military Intelligence Battalion, Fort Bragg, NC 28310

2. Trial by General court-martial on 28 September ²⁰05 at Fort Bliss, Texas 79916
convened by CMCO Number 24 HQ, USAADACENFB, Fort Bliss, TX 79916, dated 14 Oct 2004

3. Summary of offenses, pleas, and findings:

CH	ART UCMJ	SPEC	BRIEF DESCRIPTION OF OFFENSE(S)	PLEA	FINDING
I	93	The	Maltreat unknown Person Under US Control between o/a 1 Oct 2002 and o/a 1 Feb 2003.	G	G
II	107	The	Make false official statement on or about 17 December 2002.	NG	NG
III	128	1	Unlawfully force water down the throat of [REDACTED] (A.K.A.BT 421) o/a 9 Dec 02	G	G

*SEE CONTINUATION PAGE

4. SENTENCE:

5. Date sentence adjudged and effective date of any forfeiture or reduction in grade (YYYYMMDD): Adjudged: 20050928
Effective: 20051012

6. Contents of pretrial agreement concerning sentence, if any: Disapprove any confinement adjudged in excess of
one (1) year.

7. Number of days of presentence confinement, if any. 0.

8. Number of days of judge-ordered administrative credit for illegal presentence confinement or restriction found tantamount to confinement, if any: 0.

9. Total present confinement credit towards post-trial confinement: 0.

10. Name(s) and SSN(s) of companion accused or co-accused, if any: [REDACTED]

11. DNA processing IAW 10 U.S.C. § 1565 ☒ is is not required

12. Conviction(s) does ☒ does not require sex offender registration IAW 42 U.S.C. § 14071.

CF:

TYPED NAME

SIGNATURE

RANK

BRANCH OF SERVICE

CPT, TRIAL COUNSEL

US Army

DA FORM 4430, SEP 2002

DA FORM 4430-R, MAY 87, IS OBSOLETE

CH	ART UCMJ	SPEC	BRIEF DESCRIPTION OF OFFENSE(S)	PLEA	FINDING
III	128	2	Unlawfully grab [REDACTED] (A.K.A. BT 421) and pull him into and across an interrogation table o/a 9 Dec 02.	G*	G*
		3	Unlawfully twist a bag or hood tightly over the head of [REDACTED] (A.K.A. [REDACTED]) o/a 9 Dec 02	G	G
		4	Unlawfully twist a bag or hood tightly over the head of unknown Person Under US Control ("PUC") o/a 2 Dec 02	NG	NG

*excepting the words "into" and "and."

**May 20, 2005****In U.S. Report, Brutal Details of 2 Afghan Inmates' Deaths****By TIM GOLDEN**

Even as the young Afghan man was dying before them, his American jailers continued to torment him.

The prisoner, a slight, 22-year-old taxi driver known only as [REDACTED] was hauled from his cell at the detention center in Bagram, Afghanistan, at around 2 a.m. to answer questions about a rocket attack on an American base. When he arrived in the interrogation room, an interpreter who was present said, his legs were bouncing uncontrollably in the plastic chair and his hands were numb. He had been chained by the wrists to the top of his cell for much of the previous four days.

[REDACTED] asked for a drink of water, and one of the two interrogators, [REDACTED] 21, picked up a large plastic bottle. But first he punched a hole in the bottom, the interpreter said, so as the prisoner fumbled weakly with the cap, the water poured out over his orange prison scrubs. The soldier then grabbed the bottle back and began squirting the water forcefully into Mr. [REDACTED] face.

"Come on, drink!" the interpreter said [REDACTED] had shouted, as the prisoner gagged on the spray. "Drink!"

At the interrogators' behest, a guard tried to force the young man to his knees. But his legs, which had been pummeled by guards for several days, could no longer bend. An interrogator told Mr. [REDACTED] that he could see a doctor after they finished with him. When he was finally sent back to his cell, though, the guards were instructed only to chain the prisoner back to the ceiling.

"Leave him up," one of the guards quoted [REDACTED] as saying.

Several hours passed before an emergency room doctor finally saw [REDACTED]. By then he was dead, his body beginning to stiffen. It would be many months before Army investigators learned a final horrific detail: Most of the interrogators had believed [REDACTED] was an innocent man who simply drove his taxi past the American base at the wrong time.

The story of [REDACTED] brutal death at the Bagram Collection Point - and that of another detainee, Habibullah, who died there six days earlier in December 2002 - emerge from a nearly 2,000-page confidential file of the Army's criminal investigation into the case, a copy of which was obtained by The New York Times.

Like a narrative counterpart to the digital images from Abu Ghraib, the Bagram file depicts young, poorly trained soldiers in repeated incidents of abuse. The harsh treatment, which has resulted in criminal charges against seven soldiers, went well beyond the two deaths.

In some instances, testimony shows, it was directed or carried out by interrogators to extract information. In others, it was punishment meted out by military police guards. Sometimes, the torment seems to have been driven by little more than boredom or cruelty, or both.

In sworn statements to Army investigators, soldiers describe one female interrogator with a taste for

humiliation stepping on the neck of one prostrate detainee and kicking another in the genitals. They tell of a shackled prisoner being forced to roll back and forth on the floor of a cell, kissing the boots of his two interrogators as he went. Yet another prisoner is made to pick plastic bottle caps out of a drum mixed with excrement and water as part of a strategy to soften him up for questioning.

The Times obtained a copy of the file from a person involved in the investigation who was critical of the methods used at Bagram and the military's response to the deaths.

Although incidents of prisoner abuse at Bagram in 2002, including some details of the two men's deaths, have been previously reported, American officials have characterized them as isolated problems that were thoroughly investigated. And many of the officers and soldiers interviewed in the [REDACTED] investigation said the large majority of detainees at Bagram were compliant and reasonably well treated.

"What we have learned through the course of all these investigations is that there were people who clearly violated anyone's standard for humane treatment," said the Pentagon's chief spokesman, [REDACTED]. "We're finding some cases that were not close calls."

Yet the Bagram file includes ample testimony that harsh treatment by some interrogators was routine and that guards could strike shackled detainees with virtual impunity. Prisoners considered important or troublesome were also handcuffed and chained to the ceilings and doors of their cells, sometimes for long periods, an action Army prosecutors recently classified as criminal assault.

Some of the mistreatment was quite obvious, the file suggests. Senior officers frequently toured the detention center, and several of them acknowledged seeing prisoners chained up for punishment or to deprive them of sleep. Shortly before the two deaths, observers from the International Committee of the Red Cross specifically complained to the military authorities at Bagram about the shackling of prisoners in "fixed positions," documents show.

Even though military investigators learned soon after Mr. [REDACTED]'s death that he had been abused by at least two interrogators, the Army's criminal inquiry moved slowly. Meanwhile, many of the Bagram interrogators, led by the same operations officer, [REDACTED], were redeployed to Iraq and in July 2003 took charge of interrogations at the Abu Ghraib prison. According to a high-level Army inquiry last year, [REDACTED] applied techniques there that were "remarkably similar" to those used at Bagram.

Last October, the Army's Criminal Investigation Command concluded that there was probable cause to charge 27 officers and enlisted personnel with criminal offenses in the [REDACTED] case ranging from dereliction of duty to maiming and involuntary manslaughter. Fifteen of the same soldiers were also cited for probable criminal responsibility in the Habibullah case.

So far, only the seven soldiers have been charged, including four last week. No one has been convicted in either death. Two Army interrogators were also reprimanded, a military spokesman said. Most of those who could still face legal action have denied wrongdoing, either in statements to investigators or in comments to a reporter.

"The whole situation is unfair," [REDACTED] a former Bagram interrogator who was charged with assaulting Mr. [REDACTED], dereliction of duty and lying to investigators, said in a telephone interview. "It's all going to come out when everything is said and done."

With most of the legal action pending, the story of abuses at Bagram remains incomplete. But

documents and interviews reveal a striking disparity between the findings of Army investigators and what military officials said in the aftermath of the deaths.

Military spokesmen maintained that both men had died of natural causes, even after military coroners had ruled the deaths homicides. Two months after those autopsies, the American commander in Afghanistan, then- [REDACTED], said he had no indication that abuse by soldiers had contributed to the two deaths. The methods used at Bagram, he said, were "in accordance with what is generally accepted as interrogation techniques."

The Interrogators

In the summer of 2002, the military detention center at Bagram, about 40 miles north of Kabul, stood as a hulking reminder of the Americans' improvised hold over Afghanistan.

Built by the Soviets as an aircraft machine shop for the operations base they established after their intervention in the country in 1979, the building had survived the ensuing wars as a battered relic - a long, squat, concrete block with rusted metal sheets where the windows had once been.

Retrofitted with five large wire pens and a half dozen plywood isolation cells, the building became the Bagram Collection Point, a clearinghouse for prisoners captured in Afghanistan and elsewhere. The B.C.P., as soldiers called it, typically held between 40 and 80 detainees while they were interrogated and screened for possible shipment to the Pentagon's longer-term detention center at Guantánamo Bay, Cuba.

The new interrogation unit that arrived in July 2002 had been improvised as well. [REDACTED] then a 32-year-old lieutenant, came with 13 soldiers from the 525th Military Intelligence Brigade at Fort Bragg, N.C.; six Arabic-speaking reservists were added from the Utah National Guard.

Part of the new group, which was consolidated under Company A of the 519th Military Intelligence Battalion, was made up of counterintelligence specialists with no background in interrogation. Only two of the soldiers had ever questioned actual prisoners.

What specialized training the unit received came on the job, in sessions with two interrogators who had worked in the prison for a few months. "There was nothing that prepared us for running an interrogation operation" like the one at Bagram, the noncommissioned officer in charge of the interrogators, Staff Sgt. [REDACTED], later told investigators.

Nor were the rules of engagement very clear. The platoon had the standard interrogations guide, Army Field Manual 34-52, and an order from the secretary of defense, Donald H. Rumsfeld, to treat prisoners "humanely," and when possible, in accordance with the Geneva Conventions. But with President Bush's final determination in February 2002 that the Conventions did not apply to the conflict with Al Qaeda and that Taliban fighters would not be accorded the rights of prisoners of war, the interrogators believed they "could deviate slightly from the rules," said one of the Utah reservists, Sgt. [REDACTED].

"There was the Geneva Conventions for enemy prisoners of war, but nothing for terrorists," Sergeant [REDACTED] told Army investigators. And the detainees, senior intelligence officers said, were to be considered terrorists until proved otherwise.

The deviations included the use of "safety positions" or "stress positions" that would make the detainees uncomfortable but not necessarily hurt them - kneeling on the ground, for instance, or sitting in a "chair"

position against the wall. The new platoon was also trained in sleep deprivation, which the previous unit had generally limited to 24 hours or less, insisting that the interrogator remain awake with the prisoner to avoid pushing the limits of humane treatment.

But as the 519th interrogators settled into their jobs, they set their own procedures for sleep deprivation. They decided on 32 to 36 hours as the optimal time to keep prisoners awake and eliminated the practice of staying up themselves, one former interrogator, [REDACTED], said in an interview.

The interrogators worked from a menu of basic tactics to gain a prisoner's cooperation, from the "friendly" approach, to good cop-bad cop routines, to the threat of long-term imprisonment. But some less-experienced interrogators came to rely on the method known in the military as "Fear Up Harsh," or what one soldier referred to as "the screaming technique."

Sergeant [REDACTED] then 27, tried with limited success to wean those interrogators off that approach, which typically involved yelling and throwing [REDACTED] said the sergeant "put the brakes on when certain approaches got out of hand." But he could also be dismissive of tactics he considered too soft, several soldiers told investigators, and gave some of the most aggressive interrogators wide latitude. (Efforts to locate [REDACTED], who has left the military, were unsuccessful.)

"We sometimes developed a rapport with detainees, and Sergeant [REDACTED] would sit us down and remind us that these were evil people and talk about 9/11 and they weren't our friends and could not be trusted," [REDACTED] said.

Specialist [REDACTED], a tall, bearded interrogator sometimes called "Monster" -he had the nickname tattooed in Italian across his stomach, other soldiers said - was often chosen to intimidate new detainees. Specialist [REDACTED], they said, would glower and yell at the arrivals as they stood chained to an overhead pole or lay face down on the floor of a holding room. (A military police K-9 unit often brought growling dogs to walk among the new prisoners for similar effect, documents show.)

"The other interrogators would use his reputation," said one interrogator, Specialist [REDACTED] "They would tell the detainee, 'If you don't cooperate, we'll have to get Monster, and he won't be as nice.'" Another soldier told investigators that Sergeant [REDACTED] lightheartedly referred to Specialist [REDACTED] then 23, as "the King of Torture."

A Saudi detainee who was interviewed by Army investigators last June at Guantánamo said Specialist [REDACTED] had pulled out his penis during an interrogation at Bagram, held it against the prisoner's face and threatened to rape him, excerpts from the man's statement show.

Last fall, the investigators cited probable cause to charge Specialist [REDACTED] with assault, maltreatment of a prisoner and indecent acts in the incident; he has not been charged. At Abu Ghraib, he was also one of three members of the 519th who were fined and demoted for forcing an Iraqi woman to strip during questioning, another interrogator said. A spokesman at Fort Bragg said Specialist [REDACTED] would not comment.

In late August of 2002, the Bagram interrogators were joined by a new military police unit that was assigned to guard the detainees. The soldiers, mostly reservists from the 377th Military Police Company based in Cincinnati and Bloomington, Ind., were similarly unprepared for their mission, members of the unit said.

The company received basic lessons in handling prisoners at Fort Dix, N.J., and some police and

corrections officers in its ranks provided further training. That instruction included an overview of "pressure-point control tactics" and notably the "common peroneal strike" - a potentially disabling blow to the side of the leg, just above the knee.

The M.P.'s said they were never told that peroneal strikes were not part of Army doctrine. Nor did most of them hear one of the former police officers tell a fellow soldier during the training that he would never use such strikes because they would "tear up" a prisoner's legs.

But once in Afghanistan, members of the 377th found that the usual rules did not seem to apply. The peroneal strike quickly became a basic weapon of the M.P. arsenal. "That was kind of like an accepted thing; you could knee somebody in the leg," former Sgt. [REDACTED] told the investigators.

A few weeks into the company's tour, Specialist [REDACTED] overheard another guard boasting about having beaten a detainee who had spit on him. [REDACTED] also told investigators that other soldiers had congratulated the guard "for not taking any" from a detainee.

One captain nicknamed members of the Third Platoon "the Testosterone Gang." Several were devout bodybuilders. Upon arriving in Afghanistan, a group of the soldiers decorated their tent with a Confederate flag, one soldier said.

Some of the same M.P.'s took a particular interest in an emotionally disturbed Afghan detainee who was known to eat his feces and mutilate himself with concertina wire. The soldiers kneeed the man repeatedly in the legs and, at one point, chained him with his arms straight up in the air, Specialist [REDACTED] told investigators. They also nicknamed him "Timmy," after a disabled child in the animated television series "South Park." One of the guards who beat the prisoner also taught him to screech like the cartoon character, Specialist [REDACTED].

Eventually, the man was sent home.

The Defiant Detainee

The detainee known as Person Under Control No. 412 was a portly, well-groomed Afghan named Habibullah. Some American officials identified him as "Mullah" Habibullah, a brother of a former Taliban commander from the southern Afghan province of Oruzgan.

He stood out from the scraggly guerrillas and villagers whom the Bagram interrogators typically saw. "He had a piercing gaze and was very confident," the provost marshal in charge of the M.P.'s, Maj. [REDACTED], recalled.

Documents from the investigation suggest that Mr. Habibullah was captured by an Afghan warlord on Nov. 28, 2002, and delivered to Bagram by C.I.A. operatives two days later. His well-being at that point is a matter of dispute. The doctor who examined him on arrival at Bagram reported him in good health. But the intelligence operations chief, [REDACTED] Jr., later told Army investigators, "He was already in bad condition when he arrived."

What is clear is that Mr. Habibullah was identified at Bagram as an important prisoner and an unusually sharp-tongued and insubordinate one.

One of the 377th's Third Platoon sergeants, [REDACTED], told investigators that Mr. Habibullah rose up after a rectal examination and kneeed him in the groin. The guard said he grabbed the prisoner by the

head and yelled in his face. Mr. Habibullah then "became combative," [REDACTED] said, and had to be subdued by three guards and led away in an armlock.

He was then confined in one of the 9-foot by 7-foot isolation cells, which the M.P. commander, Capt. [REDACTED], later described as a standard procedure. "There was a policy that detainees were hooded, shackled and isolated for at least the first 24 hours, sometimes 72 hours of captivity," he told investigators.

While the guards kept some prisoners awake by yelling or poking at them or banging on their cell doors, Mr. Habibullah was shackled by the wrists to the wire ceiling over his cell, soldiers said.

On his second day, Dec. 1, the prisoner was "uncooperative" again, this time with Specialist [REDACTED]. The guard, who has since been charged with assault and other crimes, told investigators he had delivered three peroneal strikes in response. The next day, Specialist [REDACTED] said, he had to knee the prisoner again. Other blows followed.

A lawyer for Specialist [REDACTED] said there was no criminal intent by his client to hurt any detainee. "At the time, my client was acting consistently with the standard operating procedure that was in place at the Bagram facility."

The communication between Mr. Habibullah and his jailers appears to have been almost exclusively physical. Despite repeated requests, the M.P.'s were assigned no interpreters of their own. Instead, they borrowed from the interrogators when they could and relied on prisoners who spoke even a little English to translate for them.

When the detainees were beaten or kicked for "noncompliance," one of the interpreters, [REDACTED] said, it was often "because they have no idea what the M.P. is saying."

By the morning of Dec. 2, witnesses told the investigators, Mr. Habibullah was coughing and complaining of chest pains. He limped into the interrogation room in shackles, his right leg stiff and his right foot swollen. The lead interrogator, [REDACTED], let him sit on the floor because he could not bend his knees and sit in a chair.

The interpreter who was on hand, [REDACTED], said the interrogators had kept their distance that day "because he was spitting up a lot of phlegm."

"They were laughing and making fun of him, saying it was 'gross' or 'nasty,'" [REDACTED] said.

Though battered, Mr. Habibullah was unbowed.

"Once they asked him if he wanted to spend the rest of his life in handcuffs," [REDACTED] said. "His response was, 'Yes, don't they look good on me?'"

By Dec. 3, Mr. Habibullah's reputation for defiance seemed to make him an open target. One M.P. said he had given him five peroneal strikes for being "noncompliant and combative." Another gave him three or four more for being "combative and noncompliant." Some guards later asserted that he had been hurt trying to escape.

When [REDACTED] saw Mr. Habibullah on Dec. 3, he was in one of the isolation cells, tethered to the ceiling by two sets of handcuffs and a chain around his waist. His body was slumped forward,

held up by the chains.

Sergeant Boland told the investigators he had entered the cell with two other guards, Specialists [REDACTED]. (All three have been charged with assault and [REDACTED] crimes.) One of them pulled off the prisoner's black hood. His head was slumped to one side, his tongue sticking out. Specialist [REDACTED] said he had put some bread on Mr. Habibullah's tongue. Another soldier put an apple in the prisoner's hand; it fell to the floor.

When Specialist [REDACTED] turned back toward the prisoner, he said in one statement, Mr. Habibullah's spit hit his chest. Later, Specialist [REDACTED] acknowledged, "I'm not sure if he spit at me." But at the time, he exploded, yelling, "Don't ever spit on me again!" and kneeling the prisoner sharply in the thigh, "maybe a couple" of times. Mr. Habibullah's limp body swayed back and forth in the chains.

When [REDACTED] returned to the cell some 20 minutes later, he said, Mr. Habibullah was not moving and had no pulse. Finally, the prisoner was unchained and laid out on the floor of his cell.

The guard who [REDACTED] said had counseled him back in New Jersey about the dangers of peroneal strikes found him in the room where Mr. Habibullah lay, his body already cold.

"Specialist [REDACTED] appeared very distraught," Specialist [REDACTED] told an investigator. The soldier "was running about the room hysterically."

An M.P. was sent to wake one of the medics.

"What are you getting me for?" the medic, Specialist [REDACTED], responded, telling him to call an ambulance instead.

When another medic finally arrived, he found Mr. Habibullah on the floor, his arms outstretched, his eyes and mouth open.

"It looked like he had been dead for a while, and it looked like nobody cared," the medic, Staff Sgt. [REDACTED] ass, recalled.

Not all of the guards were indifferent, their statements show. But if Mr. Habibullah's death shocked some of them, it did not lead to major changes in the detention center's operation.

Military police guards were assigned to be present during interrogations to help prevent mistreatment. The provost marshal, [REDACTED], told investigators he had already instructed the commander of the M.P. company, Captain Beiring, to stop chaining prisoners to the ceiling. Others said they never received such an order.

Senior officers later told investigators that they had been unaware of any serious abuses at the B.C.P. But the first sergeant of the 377th, [REDACTED], told investigators that the use of standing restraints, sleep deprivation and peroneal strikes was readily apparent.

"Everyone that is anyone went through the facility at one time or another," she said.

[REDACTED] said the death "did not cause an enormous amount of concern 'cause it appeared natural."

In fact, Mr. Habibullah's autopsy, completed on Dec. 8, showed bruises or abrasions on his chest, arms

and head. There were deep contusions on his calves, knees and thighs. His left calf was marked by what appeared to have been the sole of a boot.

His death was attributed to a blood clot, probably caused by the severe injuries to his legs, which traveled to his heart and blocked the blood flow to his lungs.

The Shy Detainee

On Dec. 5, one day after Mr. Habibullah died, Mr. [REDACTED] arrived at Bagram.

Four days before, on the eve of the Muslim holiday of Id al-Fitr, [REDACTED] set out from his tiny village of Yakubi in a prized new possession, a used Toyota sedan that his family bought for him a few weeks earlier to drive as a taxi.

[REDACTED] was not an adventurous man. He rarely went far from the stone farmhouse he shared with his wife, young daughter and extended family. He never attended school, relatives said, and had only one friend, [REDACTED], with whom he would sit in the wheat fields surrounding the village and talk.

"He was a shy man, a very simple man," his eldest brother, [REDACTED], said in an interview.

On the day he disappeared, Mr. [REDACTED] mother had asked him to gather his three sisters from their nearby villages and bring them home for the holiday. But he needed gas money and decided instead to drive to the provincial capital, Khost, about 45 minutes away, to look for fares.

At a taxi stand there, he found three men headed back toward Yakubi. On the way, they passed a base used by American troops, Camp Salerno, which had been the target of a rocket attack that morning.

Militiamen loyal to the guerrilla commander guarding the base, [REDACTED] stopped the Toyota at a checkpoint. They confiscated a broken walkie-talkie from one of Mr. [REDACTED] passengers. In the trunk, they found an electric stabilizer used to regulate current from a generator. (Mr. [REDACTED] family said the stabilizer was not theirs; at the time, they said, they had no electricity at all.)

The four men were detained and turned over to American soldiers at the base as suspects in the attack. [REDACTED] and his passengers spent their first night there handcuffed to a fence, so they would be unable to sleep. When a doctor examined them the next morning, he said later, he found [REDACTED] tired and suffering from headaches but otherwise fine.

[REDACTED] three passengers were eventually flown to Guantánamo and held for more than a year before being sent home without charge. In interviews after their release, the men described their treatment at Bagram as far worse than at Guantánamo. While all of them said they had been beaten, they complained most bitterly of being stripped naked in front of female soldiers for showers and medical examinations, which they said included the first of several painful and humiliating rectal exams.

"They did lots and lots of bad things to me," said [REDACTED], a 26-year-old baker from Khost. "I was shouting and crying, and no one was listening. When I was shouting, the soldiers were slamming my head against the desk."

For Mr. [REDACTED], his fellow prisoners said, the most difficult thing seemed to be the black cloth hood that was pulled over his head. "He could not breathe," said a man called [REDACTED], who had been one of Mr. [REDACTED] passengers.

██████████ was a frail man, standing only 5 feet 9 inches and weighing 122 pounds. But at Bagram, he was quickly labeled one of the "noncompliant" ones.

When one of the First Platoon M.P.'s, Specialist ██████████, was sent to ██████████ cell to give him some water, he said the prisoner spit in his face and started kicking him. Specialist Jones responded, he said, with a couple of knee strikes to the leg of the shackled man.

"He screamed out, 'Allah! Allah! Allah!' and my first reaction was that he was crying out to his god," Specialist ██████████ said to investigators. "Everybody heard him cry out and thought it was funny."

Other Third Platoon M.P.'s later came by the detention center and stopped at the isolation cells to see for themselves, Specialist ██████████ said.

It became a kind of running joke, and people kept showing up to give this detainee a common peroneal strike just to hear him scream out 'Allah,' " he said. "It went on over a 24-hour period, and I would think that it was over 100 strikes."

In a subsequent statement, ██████████ was vague about which M.P.'s had delivered the blows. His estimate was never confirmed, but other guards eventually admitted striking ██████████ repeatedly.

Many M.P.'s would eventually deny that they had any idea of ██████████ injuries, explaining that they never saw his legs beneath his jumpsuit. But Specialist ██████████ recalled that the drawstring pants of ██████████ orange prison suit fell down again and again while he was shackled.

"I saw the bruise because his pants kept falling down while he was in standing restraints," the soldier told investigators. "Over a certain time period, I noticed it was the size of a fist."

As Mr. ██████████ grew desperate, he began crying out more loudly to be released. But even the interpreters had trouble understanding his Pashto dialect; the annoyed guards heard only noise.

"He had constantly been screaming, 'Release me; I don't want to be here,' and things like that," said the one linguist who could decipher his distress, ██████████

The Interrogation

On Dec. 8, ██████████ was taken for his fourth interrogation. It quickly turned hostile.

The 21-year-old lead interrogator, Specialist ██████████, later contended that ██████████ was evasive. "Some holes came up, and we wanted him to answer us truthfully," he said. The other interrogator, ██████████, complained that the prisoner was smiling, not answering questions, and refusing to stay kneeling on the ground or sitting against the wall.

The interpreter who was present ██████████, recalled the encounter differently to investigators.

The interrogators, ██████████ said, accused ██████████ of launching the rockets that had hit the American base. He denied that. While kneeling on the ground, he was unable to hold his cuffed hands above his head as instructed, prompting Sergeant ██████████ to slap them back up whenever they began to drop.

██████████ berated him for being weak and questioned him about being a man, which was very insulting

because of his heritage," Mr. Ahmadzai said.

When Mr. [REDACTED] unable to sit in the chair position against the wall because of his battered legs, the two interrogators grabbed him by the shirt and repeatedly shoved him back against the wall.

"This went on for 10 or 15 minutes," the interpreter said. "He was so tired he couldn't get up."

"They stood him up, and at one point Selena stepped on his bare foot with her boot and grabbed him by his beard and pulled him towards her," he went on. "Once [REDACTED] a kicked [REDACTED] in the groin, private areas, with her right foot. She was standing some distance from him, and she stepped back and kicked him.

"About the first 10 minutes, I think, they were actually questioning him, after that it was pushing, shoving, kicking and shouting at him," Mr. Ahmadzai said. "There was no interrogation going on."

The session ended, he said, with Sergeant Salcedo instructing the M.P.'s to keep Mr. Dilawar chained to the ceiling until the next shift came on.

The next morning, Mr. Dilawar began yelling again. At around noon, the M.P.'s called over another of the interpreters, [REDACTED], to try to [REDACTED] down.

"I told him, 'Look, please, if you want to be able to sit down and be released from shackles, you just need to be quiet for one more hour.'"

"He told me that if he was in shackles another hour, he would die," [REDACTED] said.

Half an hour later, [REDACTED] returned to the cell. [REDACTED] hands hung limply from the cuffs, and his head, covered by the black hood, slumped forward.

"He wanted me to get a doctor, and said that he needed 'a shot,' " [REDACTED] recalled. "He said that he didn't feel good. He said that his legs were hurting."

[REDACTED] translated [REDACTED] plea to one of the guards. The soldier took the prisoner's hand and pressed down on his fingernails to check his circulation.

"He's O.K.," [REDACTED] quoted the M.P. as saying. "He's just trying to get out of his restraints."

By the time [REDACTED] was brought in for his final interrogation in the first hours of the next day, Dec. 10, he appeared exhausted and was babbling that his wife had died. He also told the interrogators that he had been beaten by the guards.

"But we didn't pursue that," said [REDACTED], the interpreter.

[REDACTED] was again the lead interrogator. But his more aggressive partner, Specialist [REDACTED] quickly took over, [REDACTED] said.

"Josh had a rule that the detainee had to look at him, not me," the interpreter told investigators. "He gave him three chances, and then he grabbed him by the shirt and pulled him towards him, across the table, slamming his chest into the table front."

When [REDACTED] was unable to kneel, the interpreter said, the interrogators pulled him to his feet and pushed him against the wall. Told to assume a stress position, the prisoner leaned his head against the wall and began to fall asleep.

"It looked to me like [REDACTED] was trying to cooperate, but he couldn't physically perform the tasks," Mr. [REDACTED] said.

Finally, Specialist [REDACTED] grabbed the prisoner and "shook him harshly," the interpreter said, telling him that if he failed to cooperate, he would be shipped to a prison in the United States, where he would be "treated like a woman, by the other men" and face the wrath of criminals who "would be very angry with anyone involved in the 9/11 attacks." (Specialist [REDACTED] was charged last week with assault, maltreatment and failure to obey a lawful order; Specialist [REDACTED] was charged with assault, maltreatment and lying to investigators. Each man declined to comment.)

A third military intelligence specialist who spoke some Pashto, Staff [REDACTED], had questioned Mr. [REDACTED] earlier and had arranged with Specialist Claus to take over when he was done. Instead, the sergeant arrived at the interrogation room to find a large puddle of water on the floor, a wet spot on Mr. [REDACTED] shirt and Specialist [REDACTED] standing behind the detainee, twisting up the back of the hood that covered the prisoner's head.

"I had the impression that [REDACTED] was actually holding the detainee upright by pulling on the hood," he said. "I was furious at this point because I had seen Josh tighten the hood of another detainee the week before. This behavior seemed completely gratuitous and unrelated to intelligence collection."

"What the hell happened with that water?" [REDACTED] said he had demanded.

"We had to make sure he stayed hydrated," he said [REDACTED] had responded.

The next morning, [REDACTED] went to the noncommissioned officer in charge of the interrogators, [REDACTED], to report the incident. [REDACTED], however, was already dead.

The Post-Mortem

The findings of [REDACTED] autopsy were succinct. He had had some coronary artery disease, the medical examiner reported, but what caused his heart to fail was "blunt force injuries to the lower extremities." Similar injuries contributed to Mr. Habibullah's death.

One of the coroners later translated the assessment at a pre-trial hearing for Specialist [REDACTED] saying the tissue in the young man's legs "had basically been pulpified."

"I've seen similar injuries in an individual run over by a bus," added [REDACTED], the coroner, and a major at that time.

After the second death, several of the 519th Battalion's interrogators were temporarily removed from their posts. A medic was assigned to the detention center to work night shifts. On orders from the Bagram intelligence chief, interrogators were prohibited from any physical contact with the detainees. Chaining prisoners to any fixed object was also banned, and the use of stress positions was curtailed.

In February, an American military official disclosed that the Afghan guerrilla commander whose men had arrested [REDACTED] and his passengers had himself been detained. The commander, [REDACTED],

was suspected of attacking Camp Salerno himself and then turning over innocent "suspects" to the Americans in a ploy to win their trust, the military official said.

The three passengers in [REDACTED] taxi were sent home from Guantánamo in March 2004, 15 months after their capture, with letters saying they posed "no threat" to American forces.

They were later visited by [REDACTED] parents, who begged them to explain what had happened to their son. But the men said they could not bring themselves to recount the details.

"I told them he had a bed," said [REDACTED]. "I said the Americans were very nice because he had a heart problem."

In late August of last year, shortly before the Army completed its inquiry into the deaths, Sergeant Yonushonis, who was stationed in Germany, went at his own initiative to see an agent of the Criminal Investigation Command. Until then, he had never been interviewed.

"I expected to be contacted at some point by investigators in this case," he said. "I was living a few doors down from the interrogation room, and I had been one of the last to see this detainee alive."

[REDACTED] described what he had witnessed of the detainee's last interrogation. "I remember being so mad that I had trouble speaking," he said.

He also added a detail that had been overlooked in the investigative file. By the time [REDACTED] was taken into his final interrogations, he said, "most of us were convinced that the detainee was innocent."

[REDACTED]
[REDACTED]



OFFICE OF THE
CHIEF PROSECUTOR

OFFICE OF THE SECRETARY OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

May 1, 2006

From: Major Jeff Groharing
To: Commanding General, U.S. Army Air Defense Artillery Center and Fort Bliss, 1733
Pleasanton Road, Fort Bliss, TX 79916

SUBJECT: CLEMENCY REQUEST ICO SERGEANT [REDACTED]

1. [REDACTED] Defense Counsel has asked that I submit a letter on his behalf detailing his cooperation with my office in support of the prosecution of Omar Ahmed Khadr. The information below is provided for your consideration.
2. [REDACTED] is a key government witness in the case of U.S. v. Khadr. Omar Khadr is an alleged member of al Qaeda charged with murder, attempted murder, conspiracy, and aiding the enemy for crimes allegedly committed in Afghanistan in 2002. He will stand trial by military commission at Guantanamo Bay, Cuba beginning on 18 September 2006.
3. In August – October 2002, [REDACTED] interrogated Omar Khadr at Bagram Air Station, Afghanistan on numerous occasions. During these interrogations, Omar Khadr made several incriminating statements to [REDACTED] regarding Khadr's membership in al Qaeda and his terrorist activities. Specifically, Khadr admitted to throwing a grenade that killed a U.S. service member and planting improvised explosive devises in an attempt to target U.S. forces in Afghanistan. The statements taken by [REDACTED] will be introduced as evidence in the military commission trial of Omar Khadr.
4. During January 2006, after being granted immunity and ordered to testify, I met with Sergeant [REDACTED] to discuss his previous involvement with interrogations of Omar Ahmed Khadr. I spoke with [REDACTED] over the course of several hours wherein he spoke candidly and openly recounting statements made by Omar Khadr as well as [REDACTED]' own actions during the interrogations. [REDACTED] cooperated completely during our interview and has agreed to testify against Omar Khadr during his upcoming Military Commission and to participate fully in any subsequent interviews with the Prosecution or Defense.
5. I am the point of contact for this matter and can be reached at [REDACTED]
[REDACTED]

Jeffrey D. Groharing
JEFF GROHARING
Major, USMC
Prosecutor



OFFICE OF THE
CHIEF PROSECUTOR

OFFICE OF THE SECRETARY OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

November 18, 2005

MEMORANDUM THRU Bagram Prosecution Team, Building 50, Fort Bliss, TX

FOR Commanding General, U.S. Army Air Defense Artillery Center and Fort Bliss, 1733
Pleasanton Road, Fort Bliss, TX 799916

SUBJECT: Request for Grant of Immunity – [REDACTED]

1. I respectfully request that you permit the lead prosecutor in the case of U.S. v. Khadr to interview [REDACTED] and also grant [REDACTED] immunity for this interview and possible testimony before a military commission.

2. [REDACTED] is a key witness in the case of U.S. v. Khadr. Omar Khadr is a member of al Qaeda charged with murder, attempted murder, conspiracy, and aiding the enemy for crimes he allegedly committed in Afghanistan in 2002.

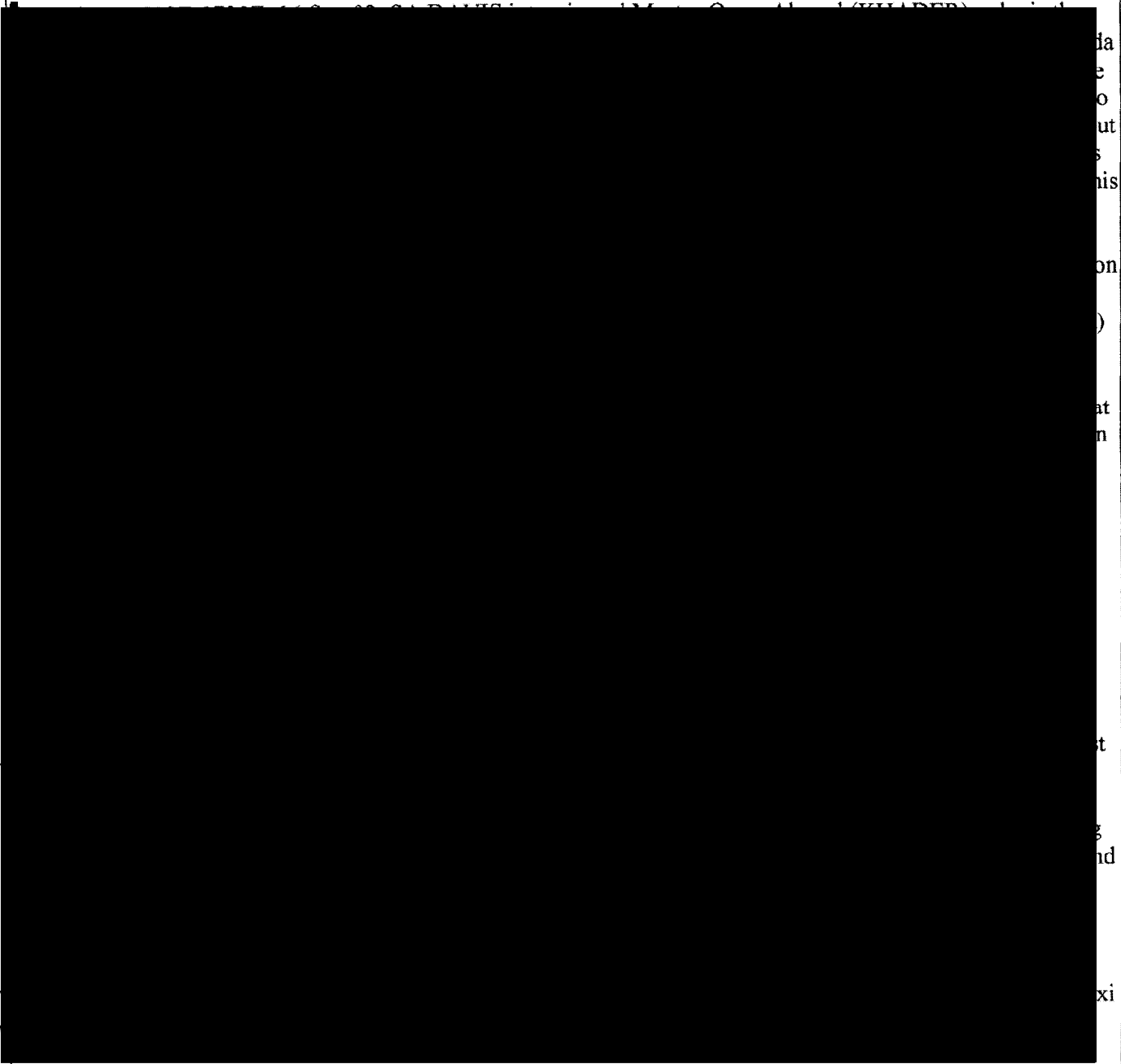

3. In August – October 2002 [REDACTED] interrogated Omar Khadr at Bagram Air Station, Afghanistan on numerous occasions. During these interrogations, Omar Khadr made several incriminating statements to Sergeant Claus regarding Khadr's membership in al Qaeda and his terrorist activities. Specifically, Khadr admitted to throwing a grenade that killed a U.S. service member and planting improvised explosive devises in an attempt to target U.S. forces in Afghanistan. The statements taken by [REDACTED] will likely be introduced as evidence in the military commission trial of Omar Khadr.

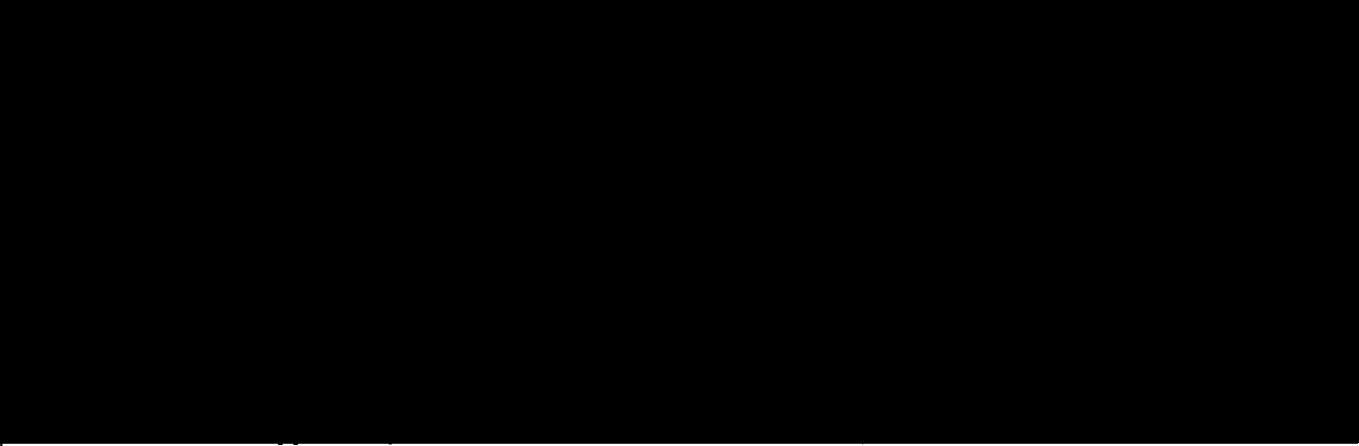

4. The lead prosecutor previously requested to interview [REDACTED] through his attorney. [REDACTED] attorney advised that [REDACTED] would not agree to an interview unless he was provided with use immunity for this interview. Granting use immunity will help facilitate this interview and ultimately assist in the prosecution of an al Qaeda terrorist charged with very serious violations of the laws of war.

5. Thank you for your assistance with this matter. Point of contact for this matter is Major Jeff Groharing. He can be reached at [REDACTED]

MORRIS D. DAVIS
Colonel, USAF
Chief Prosecutor

Attachment:
Charge Sheet in U.S. v. Khadr

AGENT'S INVESTIGATION REPORT CID Regulation 195-1		ROI NUMBER T-157
	16 Sep	
DETAILS 		
TYPED AGENT'S NAME AND SEQUENCE NUMBER S 	ORGANIZATION 38 th MP Det (CID), (DSE), (Hvy), Kandahar Airfield, Afghanistan	
SIGNATURE	DATE	EXHIBIT

AGENT'S INVESTIGATION REPORT <i>CID Regulation 195-1</i>		ROI NUMBER T-157	
DETAILS 			
TYPED AGENT'S NAME AND SEQUENCE NUMBER 		ORGANIZATION 38 th MP Det (CID), (DSE), (Hvy), Kandahar Airfield, Afghanistan	
SIGNATURE		DATE	EXHIBIT



DEPARTMENT OF THE ARMY
HEADQUARTERS, U.S. ARMY AIR DEFENSE ARTILLERY CENTER
AND FORT BLISS
1733 PLEASANTON ROAD
FORT BLISS, TEXAS 79916

REPLY TO
ATTENTION OF:

ATZC-GC

15 December 2005

MEMORANDUM FOR S [REDACTED], Company A, 519th Military
Intelligence Battalion, Fort Bragg, NC 28310


SUBJECT: Grant of Immunity and Order to Testify

1. As an officer empowered to convene general courts-martial, and under Rule for Courts-Martial [RCM] 704(c), I hereby make the following findings:

- a. You possess knowledge relevant to the trial of Omar Khadr in a Military Commission.
- b. If questioned in the course of an investigation or trial by Military Commission, under Article 31, Uniform Code of Military Justice [UCMJ], you would have the right to refuse to answer questions, and would likely invoke your right to remain silent.
- c. Because you possess information that is essential to the investigation or trial of a person before a Military Commission, your cooperation and testimony are necessary to the public interest.

2. On the basis of these facts, pursuant to RCM 704, I order you to cooperate with the government and to provide complete and truthful statements and any other evidence relevant in the investigation or trial of Omar Khadr. Cooperation includes providing complete and truthful information to investigators, trial counsel, and defense counsel, as well as complete and truthful testimony when called to do so.

3. You are hereby granted testimonial immunity under RCM 704(a)(2). No testimony or other information you provide to the government or defense pursuant to this order related to the case of Omar Khadr, or any other information directly or indirectly derived from such testimony or information, shall be used against you in a trial by court-martial or proceeding pursuant to Article 15, UCMJ, except in a prosecution of perjury, giving a false statement, or otherwise failing to comply with this order.


ROBERT P. LENNOX
Brigadier General, USA
Commanding

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██████████

████████████████████

Attachment G

PROTECTED INFORMATION

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

PROTECTED INFORMATION

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

PROTECTED INFORMATION

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

PROTECTED INFORMATION

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

AFFIDAVIT OF OMAR AHMED KHADR

I, OMAR AHMED KHADR, make oath and say as follows.

1. I am the Applicant in these proceedings and as such have personal knowledge of the matters hereinafter deposed to save and except where stated to be based upon information and belief.
2. I am a Canadian citizen. My date of birth is September 19, 1986.
3. I am a prisoner in Guantanamo Bay, Cuba. I was first taken prisoner by U.S. forces on July 27, 2002, when I was 15 years old. I was severely wounded in the battle where I was captured. I was shot at least twice in the back, at least once through my left shoulder exiting through my left breast, and once under my right shoulder, exiting out of my upper right side. I was also struck with shrapnel in my left eye, and was wounded in my left thigh, knee, ankle and foot.
4. I believe I remained conscious after being wounded and captured. I remember being carried by my arms and legs to an area in the open where someone put some bandages on me. The soldiers were asking me questions about my identity. They then placed me on a wooden board and carried me into a helicopter. I lost consciousness during the trip in the helicopter.
5. I was unconscious for about one week after being captured. When I began to regain consciousness I asked what the date was and knew that I had been unconscious for a week since being captured. I was awake, but I was not right and was out of my wits for about three days. I was in extreme pain and my pain was all I could focus on. I was in a tent hospital on a stretcher. There were two other detainees there with me, one had lost both his legs and often screamed for pain medication. The other detainee was an older man.
6. While at the tent hospital I was guarded day and night by pairs of soldiers. During the day, I was guarded by a young blond soldier who was about 25, and a Mexican or Puerto Rican soldier.
7. During the first three days I was conscious in the tent hospital, the first soldier would come and sit next to my stretcher and ask me questions. He had paper and took notes. [REDACTED]
[REDACTED]. Due to my injuries, this caused me great pain. At least two of the interrogations during these first three days occurred when I was [REDACTED]. I was unable to even stand at this time, so I was not a

threat, and I could tell that this treatment was for punishment and to make me answer questions and give them the answers they wanted.

8. The Hispanic MP [REDACTED], and would often [REDACTED]. He would tell the nurses not to [REDACTED] since he said that I had killed an American soldier. He would also [REDACTED] me quite often.
9. There were no doctors or nurses present when I was interrogated. During the interrogations, the pain was taking my thoughts away. After I regained consciousness after being unconscious for a week, the first soldier told me that I had killed an American with a hand grenade. They would only give me [REDACTED] at nighttime but the interrogations occurred during the daytime.
10. After about 2 weeks in the hospital I was immediately taken to an interrogation room at a military camp in Bagram. [REDACTED]. Then someone came in and started interrogating me. This interrogation lasted for about 3 hours. It was a skinny white interrogator with glasses who seemed to be about 25 years old. He had a small tattoo on the top of his forearm. He wore desert camouflage pants but a different kind of shirt. They asked me all kinds of questions about everything and I don't remember all the questions today.
11. During this first interrogation, the young blonde man would often [REDACTED] if I did not give him the answers he wanted. Several times, he forced me to [REDACTED], which caused me [REDACTED] due to my [REDACTED]. He did this several times to get me to answer his questions and give him the answers he wanted. It was clear that he was making me [REDACTED] because he knew that [REDACTED] and he wanted me to answer questions. I cried several times during the interrogation as a result of this treatment and pain.
12. During this interrogation, the more I answered the questions and the more I gave him the answers he wanted, the less [REDACTED] on me. I figured out right away that I would simply tell them whatever I thought they wanted to hear in order to keep them from causing me [REDACTED].
13. While detainee in Bagram, I was held with other adult detainees in a building like an airplane hangar with some chicken-wire fencing dividing the prisoner area and some wooden plank dividers or walls for separate prisoner areas. I was still on a stretcher and still had holes in my body and stitching. I was kept with all the adult prisoners.
14. The soldiers at Bagram treated me roughly. I was interrogated many, many times by interrogators. For about the first two weeks to a month that I was there I could not get out of the stretcher and would be brought into the interrogation room on a stretcher.

15. During this time, my pain depended upon what I was doing. If I was just relaxing on the stretcher, the pain would be about a 4 or 5 on a scale of 1 to 10. If I was sitting up it was more severe. If I was treated roughly or if my wounds were touched, the pain would be a 10.
16. Everyday when I was at Bagram, five people in civilian clothes would come and change my bandages. They treated me very roughly and videotaped me while they did it.
17. On one occasion, interrogators grabbed and pulled me off the stretcher, and I fell and cut my left knee.
18. On some occasions, the interrogators brought barking dogs into the interrogation room while my head was covered with a bag. The bag was [REDACTED]. This terrified me. On other occasions, interrogators threw cold water on me.
19. Several times, the soldiers [REDACTED]. Because of my injuries, particularly the bullet wounds in my chest and shoulders, [REDACTED].
20. They often made me [REDACTED] in the stretcher in order to [REDACTED]. They knew it was painful for me because of my physical reaction and because I told them it was painful.
21. While my wounds were still healing, interrogators made me clean the floors on my hands and knees. They woke me up in the middle of the night after midnight and made me clean the floor with a brush and dry it with towels until dawn.
22. They forced me to carry heavy buckets of water, which hurt my left shoulder (where I had been shot). They were 5 gallon buckets. They also made me [REDACTED]. This was very painful as my wounds were still healing.
23. On several occasions at Bagram, interrogators threatened to have me raped, or sent to other countries like Egypt, Syria, Jordan or Israel to be raped.
24. When I was able to walk again, interrogators made me pick up trash, then emptied the trash bag and made me pick it up again. Many times, during the interrogations, I was not allowed to use the bathroom, and was forced to urinate on myself. They told me that [REDACTED].
25. Sometimes they would [REDACTED], particularly since both my eyes were badly injured and had shrapnel in them.

26. Sometimes when they were questioning me, they would tell me that they would [REDACTED].
27. One time, an interrogator gave me a pen and paper and told me [REDACTED]. While I was [REDACTED], the Hispanic MP from the tent hospital came up to me, turned around and farted in my face.
28. I think that I was interrogated 42 times in 90 days. I have a memory of 42 times, but I don't recall where I received that number.
29. In Bagram, I would always hear people screaming, both day and night. Sometimes it would be the interrogators [REDACTED], and sometimes it was the prisoners screaming from their treatment. I know a lot of other detainees who were [REDACTED] by the skinny blonde guy. Most people would not talk about what had been done to them. This made me afraid.
30. An old man who was captured with me was also brought to the Bagram camp. I saw bandages and injuries on his legs from where he had been [REDACTED]. Later, one of the interrogators told me that this man had died.
31. One time before I left, I had my [REDACTED], and the skinny blond interrogator with the tattoo told me that [REDACTED].
32. After about three months, I was taken to Guantanamo. For the two nights and one day before putting us on the plane, we were not given any food so that we would not have to use the bathroom on the plane. They shaved our heads and beards, and put medical-type masks over our mouths and noses, and goggles and earphones on us so that we could not see or hear anything. One time, a soldier kicked me in the leg when I was on the plane and tried to stretch my legs.
33. On the plane, I was shackled to the floor for the whole trip. When I arrived at Guantanamo, I heard a military official say, "Welcome to Israel". They half-dragged half-carried us so quickly along the ground off the plane that everyone had cuts on their ankles from the shackles. They would smack you with a stick if you made any wrong moves.
34. They left me in a waiting area for about one hour waiting for processing. They then took me into a room where I was stripped naked and subjected to a body cavity search.
35. I was feeling a lot of back and chest pain from my injuries, and I was also dizzy from the travel, pain and lack of sleep and food.
36. Two soldiers then took charge of me, one was black and one was white. These two soldiers then pushed me up against a wall. One pushed my back into the wall

- with his elbow, and the other pushed my face into the wall. Although the goggles and headphones had been removed, the mask was still over my mouth and nose and it was difficult to breathe. They held me like this, and I could not breathe, and passed out. When they felt me falling they would start to relax, but then when I began to wake up, they would do it again until I passed out and began to fall again. They did this to me about 3 or 4 times. There were other prisoners there who were not being treated like this.
37. During processing, they gave me a 2-minute shower, took blood, fingerprints and photographs, including photos of my wounds.
 38. I was taken to the Fleet Hospital, where I stayed for two days. While in the hospital, two interrogators came and interrogated me for six hours each day. One interrogator was in civilian dress clothes and I think he told me he was with the [REDACTED]. The other was in military camouflage. They asked me questions about everything. I don't think there was anything new. They had papers with them and they took notes.
 39. I did not want to expose myself to any more harm, so I always just told interrogators what I thought they wanted to hear. Having been asked the same questions so many times, I knew what answers made interrogators happy and would always tailor my answers based on what I thought would keep me from being harmed.
 40. After those first interrogations, I was put into [REDACTED]. These are cells with walls, and only a small window that you can't look out of – the window just lets you know if its day or night. There is no [REDACTED].
 41. I would often be [REDACTED] depending on whether or not I had been co-operating with the interrogators.
 42. I was not provided with any educational opportunities, no psychological or psychiatric attention, and was routinely interrogated.
 43. While at Guantanamo, I have been visited on numerous occasions by individuals claiming to be from the Canadian government. These included four visits in the course of four days in a row, starting on March 27, 2003.
 44. The first visit was by a group of three people: two men, one in his mid-30s and a second, older man, perhaps in his 70s, and a woman about 40-50 years old. The visitors introduced themselves as Canadians. They stated that they knew my mother and grandmother in Scarborough, Canada. We met in a special conference room, rather than the usual interrogation room, and this room was more comfortable. We met for approximately 2-3 hours. Rather than asking me how I was, the visitors had a lot of questions for me.

45. I was very hopeful that they would help me. I showed them my injuries and told them that what I had told the Americans was not right and not true. I said that I told the Americans whatever they wanted me to say because they would torture me. The Canadians called me a liar and I began to sob. They screamed at me and told me that they could not do anything for me. I tried to cooperate so that they would take me back to Canada. I told them that I was scared and that I had been tortured.
46. They came back three more days but I did not sob because they had no sympathy. They asked me about people, such as my father and Arar. They showed me pictures and asked who people were. I told them what I knew.
47. During this second visit, the visitors showed me approximately 20 pictures of various people, and asked me to identify them. The Canadian visitors never asked me how I was feeling or how I was doing, nor did they ever ask if I wanted to send a message to my family.
48. The next day, the two Canadian men who had visited me returned. I told them that if they were not going to help me then I wanted them to leave me alone.
49. On the third visit by the Canadians, I told the Canadian visitors that I wanted to return to my country, Canada, and that I would speak with them there.
50. After the Canadians left and I told the Americans that my previous statements were untrue, life got much worse for me. They [REDACTED]. They would [REDACTED]. One navy interrogator would pull my hair and spit in my face.
51. Approximately one month before Ramadan in 2003, two different men came to visit me. They told me that they were Canadian. One of the men was in his 20s and the other in his 30s. These two men yelled at me and accused me of not telling the truth. One of the Canadian men stated, "The U.S. and Canada are like an elephant and an ant sleeping in the same bed," and that there was nothing the Canadian government could do against the power of the U.S.
52. One of the men returned alone approximately one month after the Eid al-Adha holiday. The visitor showed me his Canadian passport, the outside of which was red in color. The Canadian visitor stated, "I'm not here to help you. I'm not here to do anything for you. I'm just here to get information." The man then asked me questions about my brother, Abdullah.
53. Within a day of my last visit from the Canadians, my security level was changed from Level 1 to Level 4 minus, with isolation. Everything was taken away from me, and I spent a month in isolation. The room in which I was confined was kept very cold. It was "like a refrigerator".

54. Around the time of Ramadan in 2003, an Afghan man, claiming to be from the Afghan government, interrogated me at Guantanamo. A military interrogator was in the room at the time. The Afghan man said his name was "Izmarai" (Lion), and that he was from Wardeq. He spoke mostly in Farsi, and a little in Pashto and English. He had an American flag on his trousers. The Afghan man appeared displeased with the answers that I was giving him, and after some time both the Afghan and the military interrogator left the room. A military official then removed my chair and short-shackled me by my hands and feet to a bolt in the floor. Military officials then moved my hands behind my knees. They left me in the room in this condition for approximately five to six hours, causing me extreme pain. Occasionally, a military officer and the interrogators would come in and laugh at me.
55. During the course of his interrogation of me, the Afghan man told me that a new detention center was being built in Afghanistan for non-cooperative detainees at Guantanamo. The Afghan man told me that I would be sent to Afghanistan and raped. The Afghan man also told me that they like small boys in Afghanistan, a comment that I understood as a threat of sexual violence. Before leaving the room, the Afghan man took a piece of paper on which my picture appeared, and wrote on it in the Pashto language, "This detainee must be transferred to Bagram".
56. During one interrogation at Guantanamo in the spring of 2003, an interrogator spit in my face when he didn't like the answers I provided. He pulled my hair, and told me that I would be sent to Israel, Egypt, Jordan, or Syria – comments that I understood to be a threat of torture. The interrogator told me that the Egyptians would send in "Askri raqm tisa" – Soldier Number 9 – which was explained to me was a man who would be sent to rape me.
57. The interrogator told me, "Your life is in my hands". My hands and ankles were shackled, and the interrogator then removed my chair, forcing me to sit on the floor. The interrogator told me to stand up. Because of the way I was shackled, I was not able to use my hands to do so, thus making the act difficult to do. As ordered by the interrogator, I stood up, at which time the interrogator told me to sit down again. When I did so, the interrogator ordered me to stand again. I could not do so, at which point the interrogator called two military police officers into the room, who grabbed me by the neck and arms, lifted me, up, and then dropped me to the floor. The military police officers lifted and dropped me in this manner approximately five times, each time at the instruction of the interrogator. The interrogator told me they would throw my case in a safe and that I would never get out of Guantanamo. This interrogation session lasted for approximately two to three hours.
58. On one occasion at Guantanamo, in the Spring of 2003, I was left alone in an interrogation room for approximately ten hours.

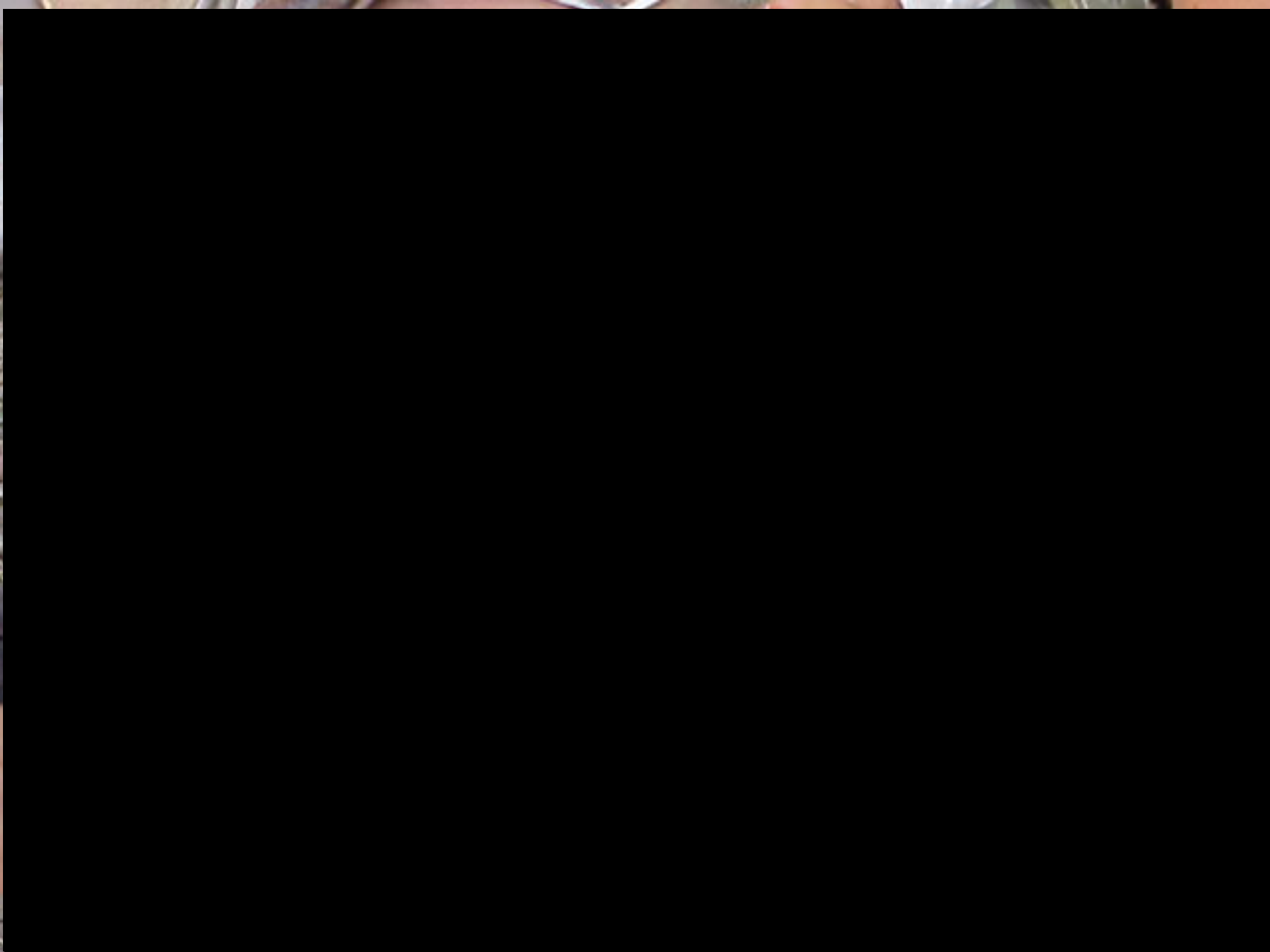
59. Around March of 2003, I was taken out of my cell at Camp Delta at approximately 12:00 – 1:00 a.m., and taken to an interrogation room. An interrogator told me that my brother was not at Guantanamo, and that I should “get ready for a miserable life”. I stated that I would answer the interrogator’s questions if they brought my brother to see me. The interrogator became extremely angry, then called in military police and told them to cuff me to the floor. First they cuffed me with my arms in front of my legs. After approximately half an hour they cuffed me with my arms behind my legs. After another half hour they forced me onto my knees, and cuffed my hands behind my legs. Later still, they forced me on my stomach, bent my knees, and cuffed my hands and feet together. At some point, I urinated on the floor and on myself. Military police poured pine oil on the floor and on me, and then, with me lying on my stomach and my hands and feet cuffed together behind me, the military police dragged me back and forth through the mixture of urine and pine oil on the floor. Later, I was put back in my cell, without being allowed a shower or change of clothes. I was not given a change of clothes for two days. They did this to me again a few weeks later.
60. When I was moved to Camp 5, I went on a hunger strike. I was very weak and could not stand. Guards would grab me by pressure points behind my ears, under my jaw and on my neck. On a scale of 1 to 10, I would say the pain was an 11. They would often knee me repeatedly in the thighs. Another time, when they took my weight, they pressed on my pressure points. I remember them videotaping me while they did this.
61. I continue to have nightmares. I dream about being shot and captured. I dream about trying to run away and not being able to get away. I dream about all that has happened. About feeling like there is nothing I can do. About feeling disabled. Besides my medical problems, the dreams are the worst right now. I continue to have back pain and pains in my joints.
62. I was first visited by lawyers in November of 2004. Before that, I had never been permitted to meet with lawyers.
63. In May 2005, they took all of my things including a calendar I had been keeping since sometime in 2004 regarding my treatment, events and other things. They never gave this back.

9.

I solemnly affirm that all of the forgoing statements are true and complete to the best of my knowledge

Omar A. Khadr

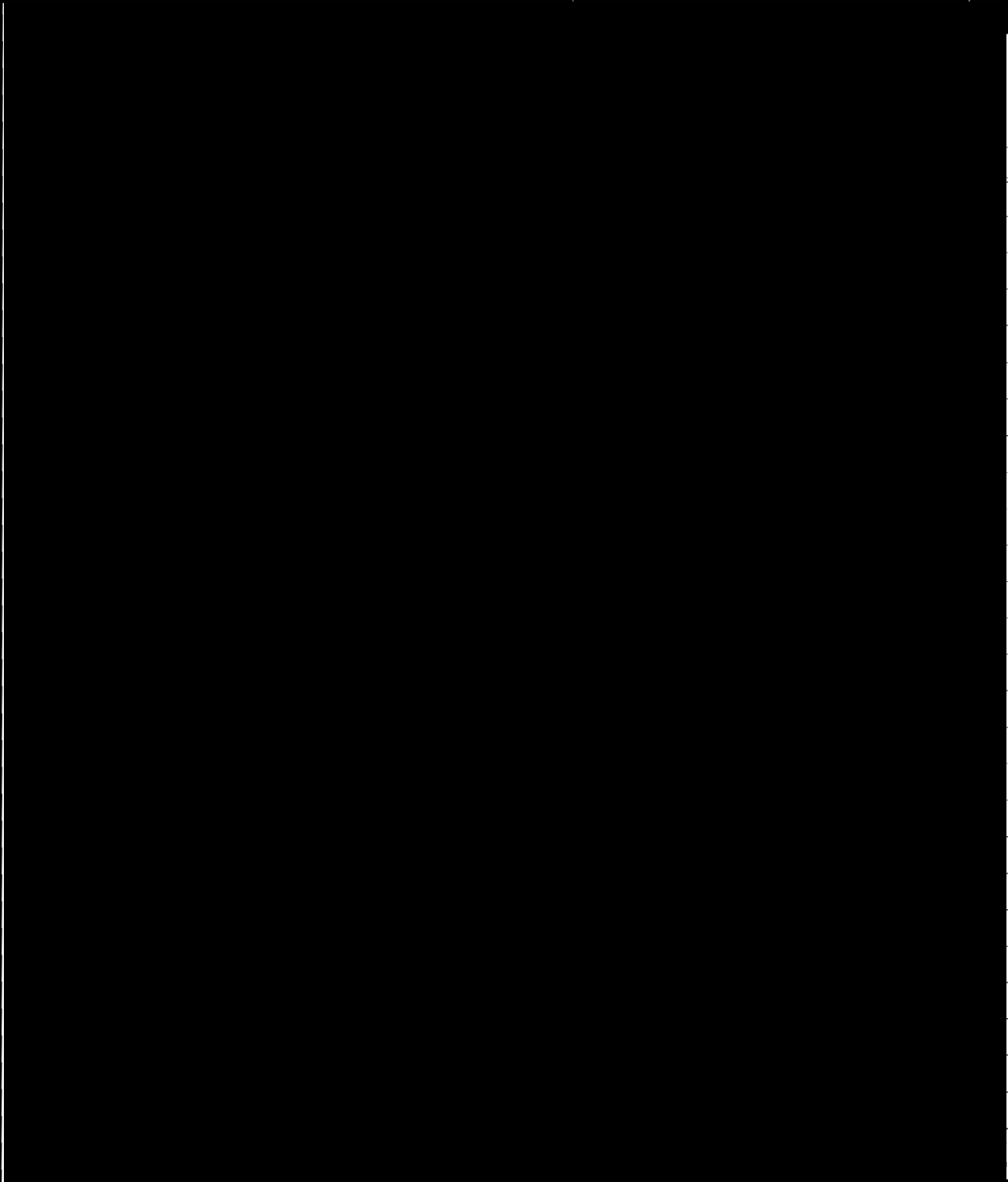
OMAR AHMED KHADR
22 February 2008



[illegible]

[REDACTED]

[REDACTED]



**CRIMINAL INVESTIGATION TASK FORCE (CITF)
REPORT OF INVESTIGATIVE ACTIVITY**

1. DATE OF INVESTIGATIVE ACTIVITY

03 Jun 03

2. PLACE

Guantanamo Bay, Cuba

3. ACTIVITY NUMBER

[REDACTED]

4. REMARKS

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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PAGE 1 OF 1 PAGES

FOUO/LES

Attachment L
AE 104 (Khadr)
Page 53 of 77
00766-000154

**CRIMINAL INVESTIGATION TASK FORCE (CITF)
REPORT OF INVESTIGATIVE ACTIVITY**

1. DATE OF INVESTIGATIVE ACTIVITY

12 Mar 03

2. PLACE

Camp Delta, Guantanamo Bay, Cuba

3. ACTIVITY NUMBER

[REDACTED]

4. REMARKS

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

know the man's name.

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PAGE 1 OF 2 PAGES

FOUO/LES

Attachment M

AE 104 (Khadr)
Page 54 of 77

00766-000151

4. REMARKS (Continued)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[illegible]

4. REMARKS (Continued)

[REDACTED]

[REDACTED]

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CRIMINAL INVESTIGATIVE TASK FORCE (CITF)
REPORT OF INVESTIGATIVE ACTIVITY

1. DATE OF INVESTIGATIVE ACTIVITY

17 Feb 03

2. PLACE

Guantanamo Bay, Cuba

3. ACTIVITY NUMBER

4. REMARKS

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PAGE 1 OF 2 PAGES

4. REMARKS (Continued)

[REDACTED]

[REDACTED]

[REDACTED]

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**CRIMINAL INVESTIGATION TASK FORCE (CITF)
REPORT OF INVESTIGATIVE ACTIVITY**

1. DATE OF INVESTIGATIVE ACTIVITY

06 Jan 03

2. PLACE

Guantanamo Bay, Cuba

3. ACTIVITY NUMBER

[REDACTED]

4. REMARKS

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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PAGE 1 OF 2 PAGES

FOUO/LES

Attachment P

AE 104 (Khadr)
Page 60 of 77

00766-000139

4. REMARKS (Continued)

[REDACTED]

[REDACTED]

[REDACTED]

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To:

FW: Filing Designation: D-027 Motion to Compel Discovery (SGT Claus) - US v. Khadr

Sir,

The government intends to comply with the defense request.

By doing so, the government in no way concedes to the relevance or admissibility of any of the documents in question at trial.

 $V/R,$

Jeff Groharing
Major, U.S. Marine Corps
Prosecutor

missions

13 March 2008

The following is a summary of an RMC 802 conference held at 1730 hours, 12 March 2008, at Guantanamo Bay, Cuba.

1. The following were present:

- a. The Military Judge, COL Peter Brownback
- b. Government Counsel, CPT Petty, Mr. John Murphy
- c. Defense Counsel, LCDR Kuebler, Ms. Rebecca Snyder, SSG Rebekah Stuyvesant

2. The parties discussed the status of each of the discovery issues raised in motions and notice of motions D025 through D038. Regarding D025, MTC (eyewitnesses), the prosecution stated that it was in the process of fine tuning a list of eyewitnesses present at the 27 July 2002 firefight that it will give the defense tomorrow. Initially, the prosecution stated that the list was prepared by searching the files of the trial counsel, case investigator, CITF case agent and case paralegal. The prosecution later clarified that it has obtained information from OGAs in preparing this list. The prosecution stated that the defense will not necessarily get the names of each eyewitness, but that the defense will be given a means to speak with each eyewitness.

3. Regarding D026, MTC (documents relating to Charge III) the parties have not reached an agreement on this motion. The government was unsure whether it could obtain the documents referenced in Attachment A to D026. The military judge directed the government to determine whether it could obtain those documents.

4. Regarding D027, MTC (documents regarding investigation & prosecution of Sgt []), the government stated that it intended to comply with the defense discovery request.

5. Regarding D028, Motion to Depose LtCol W, the parties have not reached an agreement on this motion. The military judge asked the defense why the defense believes it entitled to depose LtCol W. The defense explained that the information sought from LtCol W will impact further discovery in the case and is vital to reconstruct the events as one or two of the three reports he wrote were compiled immediately after the 27 July firefight and are based on LtCol W's interviews of many witnesses. The defense explained it wanted to ask LtCol W who those witnesses were so that it could attempt to talk to them prior to trial. The defense also explained that it wanted to explore what led to LtCol W altering and apparently backdating the last report. The prosecution stated that while it could not guarantee that LtCol W would not deploy and be unavailable at trial, it did not think that was likely and it intended to call him as a witness. In responding to a question from the military judge, the prosecution stated that it would prefer to not be able to admit LtCol W's statements at trial if he were not available to testify than for the defense to depose him prior to trial.

6. Regarding D029, MTC (accused's statements), the government stated that summaries of additional statements were forthcoming. It explained that it could not find the first several statements the defense specified in its motion. The government also explained that it has handwritten notes (in short-hand) containing the accused's statements that it has not produced to the defense because it has determined that they are not relevant or material.

7. Regarding D030, MTC (documents relating to investigation of Col Davis complaint), the parties have not reached an agreement on this motion. The military judge told the defense to review the Tate document available on the DoD website. In response to the military judge, the government explained that it could make the requested documents available to the defense.

8. Regarding D031, NOM (physical evidence), the government stated that it has done a thorough search and has not located any physical evidence that the defense does not have.

9. Regarding D032, NOM (documents regarding capture & detention), the defense clarified that it is requesting documents such as message traffic, casualty reports, and incident reports. The military judge directed the government to determine what unit or units and US elements were involved in the firefight, and whether there was an after action or other report of activity prepared by any of them. The military judge also instructed the government to search for relevant message traffic from 27-30 July 2002.

10. Regarding D033, NOM (communications between US & Canada), the government explained that it had a search performed for the requested documents at the State Department because it thought this agency was the most likely to contain relevant documents and that none were found. The defense explained that there must be some communications because something caused Canada to generate the response attached to D033 as Attachment A. The defense suggested that the communications might have been through US intelligence agencies rather than the State Department. The government then explained that it had conducted a search at other agencies as well and did not find the requested documents.

11. Regarding D034, MTC (documents regarding investigation of detainee abuse in Bagram), the government explained that it is going to produce documents in connection with D027, which should be sufficient. The defense explained that at least 27 people in one unit had been investigated for detainee abuse at Bagram so the documents relating to D027 may not be sufficient to satisfy the document request at issue in D034. The government was unsure of the scope of the investigation relating to D027 and thought that it might have been one large detainee abuse investigation, rather than multiple investigations, and said that it would check on that.

12. Regarding D035, NOM (interrogators), the government explained that it has given the defense all the names of the accused's interrogators. The defense explained that it has numbers, not names, for many of the interrogators, and that there are interrogators who are not identified in the many of the interview summaries, interrogation reports, etc. The defense also explained that it had just become aware of one potential interrogator through a recent newspaper article that was not contained in the discovery. The government explained that it would look further into what had been done to identify the accused's interrogators.

13. Regarding D036, NOM (SOPs & interrogation manuals), in Major Groharing's absence, Capt Petty was unsure of whether these items had been looked for and stated he would check.

14. Regarding D037, NOM (videos, audio recordings, photos of accused), the government stated that it was aware of only one video the defense did not have and it was working to obtain authorization to produce it to the defense. The defense stated that many photos of the accused had been taken, many of them in connection with medical care, and asked whether the government had them. It

stated it did not, but that it was unsure of whether the medical records contained those photos. The government explained that both the defense and government have done everything that is required to obtain the medical records, but that JTF had just informed Capt Petty and LCDR Kuebler that it would not release the medical records without authorization from the defense that JTF could give the records to the prosecution. The government also explained that it doesn't know whether the medical records JTF has include medical records from Bagram or other sources because JTF had not yet responded to the government question as to the scope of the records.

15. Regarding D038, NOM (classified report), the government stated that it will produce to the defense an unclassified summary of the report shortly.

16. The defense explained that it had submitted two supplemental discovery requests to the government, and the government explained that it submitted a discovery request to the defense. The military judge emphasized that he wanted to resolve the discovery issues and encouraged the parties to discuss the requests.

17. The parties discussed several administrative issues, including displaying attachments to the motions on the video screens in the courtroom, referencing attachments, publishing motions and responses on the DoD website.

18. The defense also told the military judge that it may be necessary to have a closed session in the event that it needed to discuss information contained in the classified documents attached to the motions. The military judge stated that the defense should refer to the information by paragraph and that there would be no need to have a closed session.

19. The defense explained that the convening authority had requested more information before deciding whether to grant the defense request for an expert consultant relating to al Qaeda. In the event the request is denied, the defense will need to litigate the expert request. The defense stated that if the convening authority denies the expert request, then the defense will file a motion to continue the deadline for responding to P003 as expert assistance is needed to respond.

20. The defense noted that the government's complaints in responding to the D024 (defense motion for to continue evidentiary motions deadline) that the defense has spent time going TAD rather than preparing for trial raises a question of whether counsel is competent since the government alleges they are not preparing for trial. The government responded that its response says the defense is competent and that it was not raising this ethical issue.

21. Any issues requiring a decision were withheld until the hearing tomorrow. The MJ urged both parties to talk to each other about discovery issues and try to resolve them amongst themselves. The military judge also urged both parties to come up with a trial schedule. Neither party had anything further.

22. This summary was agreed to by defense counsel and government counsel before it was signed by the military judge.

Peter E. Brownback III
COL, JA, USA
Military Judge

14 March 2008

The following is a summary of an RMC 802 conference held at 1825 hours, 13 March 2008, at Guantanamo Bay, Cuba.

1. The following were present:

- a. The Military Judge, COL Peter Brownback
- b. Government Counsel, MAJ Groharing, CPT Petty, Mr. John Murphy, SSG Ona
- c. Defense Counsel, LCDR Kuebler, Ms. Rebecca Snyder, SSG Rebekah Stuyvesant

2. The military judge reviewed each motion again to ensure that each side understood which motions he intended to rule on. Regarding D025, MTC (eyewitnesses) the military judge will not rule at this point. The prosecution is in the process of fine tuning a list of eyewitnesses present at the 27 July 2002 firefight that it will give the defense. The prosecution will provide names of people, but may not be able to provide units or contact information on some of the personnel.

3. Regarding D026, MTC (documents relating to Charge III), the military judge will not rule at this point. The prosecution is working on trying to obtain the conspiracy documents.

4. Regarding D027, MTC (documents regarding investigation & prosecution of Sgt []), the military judge will not rule at this point. The government stated that it intended to comply with the defense discovery request.

5. Regarding D028, motion to depose LtCol W, the military judge will rule by tomorrow.

6. Regarding D029, MTC (accused's statements), the military judge will rule by tomorrow.

7. Regarding D030, MTC (documents relating to the investigation of Col Davis complaint), the military judge will rule by tomorrow.

8. Regarding D031, NOM (physical evidence), the military judge will not rule at this point because the government says that it does not have any physical evidence not produced to the defense.

9. Regarding D032, NOM (documents regarding capture & detention), the military judge will not rule on the motion at this point. But the military judge instructed the government to comply with what was put on the record at the hearing today regarding searching for message traffic, etc. The search should cover 27 July - 8 August 2002.

10. Regarding D033, NOM (communications between US & Canada), the military judge will not rule at this point. The government must comply with what was put on the record when searching for communications with Canada. The search should cover 27 July through 31 December 2002.

11. Regarding D034, MTC (documents regarding investigation of detainee abuse in Bagram), the military judge will not rule at this point. The government

explained that it is going to produce documents in connection with D027 and that D027 is subsumed by D034.

12. Regarding D035, NOM (identity of interrogators), the military judge will rule by tomorrow.

13. Regarding D036, NOM (SOPs & Manuals), the military judge will not rule at this point. The government must look for any SOPs & interrogation manuals, other than the SOP mentioned in conjunction with D034/D027.

14. Regarding D037, NOM (videos, audio recordings, photos of accused), the military judge will not rule at this point.

15. Regarding D038, NOM (classified report), the military judge will not rule at this point since the government will provide to the defense an unclassified summary of the report shortly.

16. Regarding D024, defense motion for continuance of evidentiary motions deadline, the military judge will rule by tomorrow.

17. The government will provide the defense with the medical records tomorrow, 14 March 2008.

18. The military judge explained that the defense can raise further issues with the military judge if the defense is not satisfied with the documents produced by the government.

19. The government raised an issue regarding the release of filings. It said that it appears that the defense is releasing their filings before they are filed with the Court. The defense explained that it had the understanding that it could discuss the contents of their filings with people outside the defense team prior to the court releasing the filing to the public as long as it did not divulge FOUO information. The military judge stated that he is troubled with a motion being released before it reaches military judge's hands. But the military judge explained the defense may call up the press and let them know a motion would be sent out the next day regarding XYZ and that it thinks it is entitled to the requested relief because of abc.

20. This summary was agreed to by defense counsel and government counsel before it was signed by the military judge.

Peter E. Brownback III
COL, JA, USA
Military Judge

12 April 2008

Subject: Summary - RMC 802 Conference - 10 April 2008

The following is a summary of an RMC 802 conference held at 1000 hours, 10 April 2008, at Guantanamo Bay, Cuba.

1. The following were present:

- a. The Military Judge, COL Peter Brownback
- b. Government Counsel, Maj Jeff Groharing, CPT Keith Petty, Mr. John Murphy, SSG Guadalupe Ona
- c. Defense Counsel, LCDR Bill Kuebler, Ms. Rebecca Snyder, SSG Rebekah Stuyvesant

2. The parties discussed the status of each of the outstanding discovery issues raised and/or litigated at the hearing on 13 March 2008, supplemental defense discovery requests, as well as the motions and notice of motions filed by the defense since the last hearing.

3. Regarding D025, MTC (eyewitnesses), the prosecution has provided the defense a partial list of soldiers present in the vicinity of the firefight resulting in the accused's capture. The prosecution has requested additional information from each unit present at the firefight and will provide any updates we receive.

4. Regarding D050, Notice of Motion (Reports from other Special Operations Units), and D032 (Motion to Compel Documents re Capture & Detention), which subsumes D050, the government stated it has been able to locate a few additional documents related to the firefight and will provide them after appropriate redactions are made. The government has requested all units present to review their files as well as CENTCOM. Several units have advised the government that they do not have any responsive documents. The Government expects a comprehensive response from CENTCOM in the near future. The government stated that military units were not required to conduct death investigations for combat deaths until post-Tillman. The military judge suggested the government contact the "HRC" or like organization to attempt to find a "casualty report" related to SFC Chris Speer's death. Resolution of this discovery issue is still pending.

5. Regarding D026, MTC (documents relating to Charge III), at the March hearing the military judge directed the prosecution to determine whether it could obtain the requested documents. The prosecution has obtained them and does not intend to produce them because they are accurately summarized in the 9/11 Report. The government also contends they are not relevant because whether the alleged co-conspirator disagreed with the tactics of al Qaeda is irrelevant to whether there was an al Qaeda conspiracy. The defense explained that evidence that the individuals with whom Mr. Khadr is alleged to have conspired did not agree that particular attacks should be carried out is relevant. Resolution of this discovery issue is still pending. In response to the military judge's question regarding what the government can prove up in light of the dismissal of language from the conspiracy charge due to the Commission's ruling on D019, the prosecution responded that they intended to show an al Qaeda conspiracy was formed to accomplish certain objectives, that the organization is a conspiracy, that the

accused joined the conspiracy that was already existing in order to do the types of things al Qaeda had previously done. The prosecution explained that their proof would include evidence regarding the 9/11 attacks, the USS COLE Bombing, the embassy attacks, etc., and that this evidence goes to the accused's knowledge of what he joined. In response to the military judge questioning what the 9/11 attacks have to do with the accused since he is alleged to have joined the conspiracy in June 2002, the prosecution explained that it shows that the accused knew what kinds of things al Qaeda did when he joined the conspiracy. The defense stated that the government's proffer suggests that it still intends to prove liability based on a criminal enterprise theory; but the government must show a specific agreement to commit certain object offenses, which makes the documents even more relevant after the military judge's ruling on D019. The defense explained that it has established more than a baseline of materiality regarding the documents. Resolution of this discovery issue is still pending.

6. Regarding D027, MTC (Sgt C Docs), and D034 MTC (Bagram Abuse Investigation), the government produced 5132 pages to the defense on 3 April, which are all but a few subparts of the investigation. The defense will review the documents and notify the commission if there are any additional issues relating to these motions.

7. Regarding D029, MTC (Khadr's Statements), the government has produced three unclassified summaries approved by the Military Judge following an MCRE 505 hearing. The government intends to produce four more documents. There will be a summary produced in lieu of classified information for another one of those documents after an MCRE 505 hearing, which will have to be held sometime after this week. Resolution of this discovery issue is still pending.

8. Regarding D030, MTC (Docs re Davis Investigation), the government filed a motion to reconsider which will be addressed on the record tomorrow.

9. Regarding D031, Notice of Motion (Physical Evidence), the prosecution has learned that the original video found at the compound is located in an evidence locker at JTF. The prosecution was also advised that an English Bible that was purportedly found at the scene of the fire is also located in the evidence locker. The prosecution will make this evidence available to the defense. Resolution of this discovery issue is still pending.

10. Regarding D033, Notice of Motion (US-Canadian Correspondence), State department has found some relevant documents, which the prosecution will look at next week. Resolution of this discovery issue is still pending. The defense counsel noted that the Canadian Government representative present for the hearing stated that Canada has documents relevant to the case and wants to know what level of protection the documents should receive if released to defense counsel pursuant to the Canadian litigation in Mr. Khadr's case. Resolution of this discovery issue is still pending.

11. Regarding D035, Notice of Motion (Interrogators ID), the government intends to file a motion to reconsider.

12. Regarding D036, MTC (Manuals & SOPs), the government has numerous manuals and SOPs (approximately 675 pages) in effect during the time periods that the accused was interrogated. The government will continue to gather all manuals and SOPs that would have been in effect during interrogations of the accused.

13. Regarding D048, Notice of Motion (SERE SOP), the government said that it did not intend to produce this document because it was never adopted as policy, so it is not relevant. There is also an additional interrogation manual the government has reviewed and does not intend to produce. Resolution of this discovery issue is still pending.

14. Regarding D037, Notice of Motion (Videos, Audio, Photos), the government can only find one video, which is the video of the Canadian interrogation. It is in the process of making a copy of this video for the defense. The government did not locate any photos or videos taken in connection with changing the accused's bandages in Bagram or during medical exams. Resolution of this discovery issue is still pending.

15. Regarding D038, Notice of Motion (Classified Report), the government has produced an unclassified summary to the defense.

16. Regarding D041, MTC (██████ Documents), the prosecution has an MCRE 505 filing for the military judge today that relates to this motion. It is a declaration that says the documents the defense seeks do not contain derogatory information. The defense explained that it also requested information relating to ██████'s training and experience. The government stated that ██████ has agreed to speak to the defense and that he would answer some questions about this, but may be limited in what he can say. The defense explained that because ██████ had an incentive to describe his training and experience in such a way as to make his conclusions regarding who threw the grenade credible, it was important to be able to independently verify ██████'s claims regarding his training and experience. The military judge stated the defense could raise this issue after talking to ██████.

17. Regarding D042, MTC (Intelligence Reports re Compound), the prosecution stated the defense has all the written intelligence reports that they have been able to locate after making requests of all appropriate USG agencies. It intends to produce an unclassified summary of classified information regarding the intelligence that led U.S. forces to the compound where the accused was captured after a protective order is entered regarding this document. Resolution of this discovery issue is still pending.

18. Regarding D043, MTC (DIMS), the prosecution is in the process of gathering the information. Resolution of this discovery issue is still pending.

19. Regarding D044, MTC (Various Individuals), the defense filed the motion on 7 April 2008, so the government is not yet prepared to respond. The government will respond in writing. Resolution of this discovery issue is still pending.

20. Regarding D045, Notice of Motion (al Qaeda membership lists), the defense filed it on 7 April 2008, so the government is not yet prepared

to respond. The government will respond in writing. Resolution of this discovery issue is still pending.

21. Regarding D046, Notice of Motion (Identity of Co-conspirators), the defense filed it on 7 April 2008, so the government is not yet prepared to respond. The government will respond in writing. Resolution of this discovery issue is still pending.

22. Regarding D047, Special Request for Relief to Strike Additional Language from Charge III based on the ruling for D019 and filed on 9 April 2008, the government will respond in writing. Resolution of this discovery issue is still pending.

23. Regarding D049, MTC (LIFG), the government stated that the request was overbroad, the defense had not described how the requested documents would material to the preparation of the defense and that it would respond in writing. Resolution of this discovery issue is still pending.

24. Regarding D051, Notice of Motion (Recruitment of Child Soldiers), the defense filed it on 9 April 2008, so the government is not yet prepared to respond. The government will respond in writing. Resolution of this discovery issue is still pending.

25. Regarding D052, Notice of Motion (SOPs re Minors), the government stated that it is expending tremendous resources looking for documents. The defense explained that if the government has detained and treated the accused in a manner that does not comply with applicable SOPs, that fact is admissible as mitigating evidence for sentencing. The military judge stated that he would give the prosecution an opportunity to respond in writing.

26. Regarding D053, Notice of Motion (Investigator Notes), the prosecution stated that there is no reason to produce the notes since they are incorporated in the Form 40s. The military judge stated that the prosecution could respond in writing.

27. The defense inquired as to whether the Notices of Motion would become part of the record and made publicly available. The military judge said that they would be. The military judge invited the defense to let him know for which motions or notices of motions the parties had completed the filings that had not yet been released.

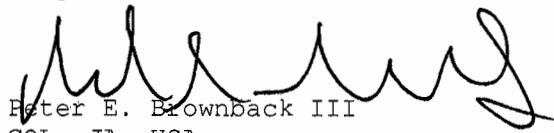
28. The defense asked if the temperature in the courtroom could be raised because counsel and the client were extremely cold during the last hearing. The military judge asked Capt Petty to handle the issue.

29. The defense noted that after the last hearing, discovery materials were taken from the client's box where his commissions legal materials are kept. When he asked for the documents, he was brought an empty box. The defense explained that the detainees are allowed to have access to habeas legal materials without transport, but to see commissions legal materials they must be transported and shackled. The prosecution explained that they had been told about a stamping policy whereby legal materials could be marked as such, but that stamping legal materials was not required. The defense also explained that the JTF intended to implement a policy that all notes taken during client

meetings are classified, but that there was no mechanism to "declassify" the notes. The military judge asked Capt Petty to obtain a copy of the stamping policy, the classification of notes policy, and the policy as to what documents can be reviewed where. Captain Petty asked the defense to approach him regarding any problems they are having related to meeting with their client or preparing a defense.

30. The defense stated that it intended to file another discovery motion in which it would seek documents relating to the principle of *tu quoque*.

31. This summary was agreed to by defense counsel (on 11 April) and government counsel (on 12 April) before it was signed by the military judge.



Peter E. Brownback III
COL, JA, USA
Military Judge

CF: All attendees.

Khadr - Motions Status Summary a/o 9 May 2008
V2 after RMC 802 Conference at 0830

Includes information from Filings Inventory, RMC 802 Conferences, and Transcripts

P-001 Complete
P-002 Complete
P-003 Pending – a) CA action on witness request, b) MJ ruling on MJ-012
P-004 Complete
P-005 Complete
P-006 Complete

D-001 Complete
D-002 Complete
D-003 Complete
D-004 Complete
D-005 Complete
D-006 Complete
D-007 Complete
D-008 Complete
D-009 Complete
D-010 Complete
D-011 Complete
D-012 Complete
D-013 Complete
D-014 Complete
D-015 Complete
D-016 Complete
D-017 Complete
D-018 Complete
D-019 Complete
D-020 Complete
D-021 Complete
D-022 Complete
D-023 Complete
D-024 Complete

D-025 Action complete. If DC want more, they will make a new request. MJ will file a determination in the matter.

D-026 Complete

D-027 Action complete. If DC want more, they will make a new request. MJ will file a determination in the matter.

D-028 Complete

D-029 TC waiting for final confirmation from CENTCOM that no subordinate units/agencies have any other notes. Once received, TC will advise DC.

D-030 Complete

D-031 Action complete. If DC want more, they will make a new request. MJ will file a determination.

D-032 Government still working on finding post-action reports. Gov't looking for casualty reports. This motion subsumes D-050. ROT 11 Apr 08. **Gov't believes that some report will be declassified next week. ROT 8 May.**

D-033 Government was to review DOS documents week of 15 April. ROT 11 Apr 08. **Mr. Murphy has completed review and should get documents next week. TC will advise DC of what documents it is not providing. TC stated some documents re Khadr's father – DC demanded research on them. TC will search and advise. ROT 8 May 08.**

D-034 This motion is subsumed by D-027. ROT 11 Apr 08. **Action complete. If DC want more they will make a new request. MJ will file a determination in the matter.**

D-035 MJ issued ruling. Government email dated 2 April 2008 said it was going to file motion to reconsider. Still not received. ROT 11 Apr 08. **Government will file a classified request for reconsideration in Gitmo o/a 6 May – TC – 30 Apr. TC filed classified request for reconsideration 6 May, not signed. MJ signed revised order 7 May. Action complete.**

D-036 Government is still searching for Manuals and SOPs. ROT 11 Apr 08. **Parties still discussing OGA manuals. TC/DC talk re submitting written interrogatories thru TC to OGA re certain techniques. ROT 8 May.**

D-037 Government trying (a/o 11 Apr) to make copy of one video for DC. Government did not locate any other videos or photos. ROT 11 Apr 08. **Still tech problems with face changing on tape. Plus TC, at DC request, trying to get video declassified if tech problem solved. ROT 8 May.**

D-038 Government gave unclassified version of report. DC will advise if it wants more. ROT 11 Apr 08. **Action complete. MJ will file a determination in the matter.**

D-039 Complete

D-040 Complete

D-041 No action by MJ until DC reviews in light of Pro Ord #4. ROT 11 Apr 08. **DC still reviewing in light of Pro Ord #4. ROT 8 May.**

D-042 No action by MJ until DC reviews in light of Pro Ord #4. ROT 11 Apr 08. **DC still reviewing in light of Pro Ord #4. ROT 8 May.**

D-043 No response from government. Will one be furnished? ROT 11 Apr 08. DC - 27 Apr 08 indicates that gov't has provided discovery. Problems with means of discovery. TC - 30 Apr - will work w/DC w/in constraints of maintaining control of documents. **Problem mutated. MJ issued oral ruling, will issue final ruling in writing. Ruling include furnishing DIMS Binder 2 by 22 May 1700 hours. TC will discuss with JTF need to cooperate w/information requests or face lengthy delay in trial. ROT 8 May.**

D-044 Response filed. a) Does DC want to reply? No - DC 29 Apr. b) Does either side want further oral argument? Yes - DC 30 Apr. **Both sides argued this motion w/D-049. MJ will issue ruling. ROT 8 May.**

D-045 Response filed. a) Does DC want to reply? No - DC 29 Apr. b) Does either side want further oral argument? Yes - DC 30 Apr. **Both sides argued. MJ will issue ruling. ROT 8 May.**

D-046 Response filed. a) Does DC want to reply? No - DC 29 Apr. b) Does either side want further oral argument? Yes - DC 30 Apr. **Both sides argued. MJ will issue ruling. ROT 8 May.**

D-047 Response filed. a) Does DC want to reply? No - DC 29 Apr. b) Does either side want further oral argument? No - DC 29 Apr. **With MJ for decision.**

D-048 Response filed. a) Does DC want to reply? No - DC 29 Apr. b) Does either side want further oral argument? Yes - DC 30 Apr. **Both sides argued. MJ will issue ruling. ROT 8 May.**

D-049 Response filed. a) Does DC want to reply? No - DC 29 Apr. b) Does either side want further oral argument? Yes - DC 30 Apr. **Both sides argued this motion w/D-044. MJ will issue ruling. ROT 8 May.**

D-050 This motion is subsumed by D-032. ROT 11 Apr 08.

D-051 Response filed. a) Does DC want to reply? No - DC 29 Apr. b) Does either side want further oral argument? Yes - DC 30 Apr. **Both sides argued. MJ will issue ruling. ROT 8 May.**

D-052 No response received. Does either side want oral argument? Yes - DC 30 Apr. Government working to find documents - TC 30 Apr. **No argument. TC has found at least two documents. Still searching. ROT 8 May.**

D-053 Response filed. a) Does DC want to reply? No – DC 29 Apr. b) Does either side want further oral argument? Yes – DC 30 Apr. **Both sides argued. MJ will issue ruling. ROT 8 May.**

D-054 Complete.

D-055 Motion filed. Response **received. Both sides argued. MJ will issue ruling. ROT 8 May.**

MJ-001 Complete

MJ-002 Complete

MJ-003 Complete

MJ-004 Complete

MJ-005 Complete

MJ-006 Complete

MJ-007 Complete

MJ-008 Complete

MJ-009 With MJ for decisions on trial schedule. **MJ set certain dates on the record. Will supplement with formal ruling. Both sides argued. ROT 8 May.**

MJ-010 Complete

MJ-011 Complete

MJ-012 Parties have submitted briefs, **responses to briefs, and DC reply to response. MJ declined to hear argument on motion on 8 May.**

[REDACTED]
[REDACTED]
Sent:
To:
[REDACTED]

[REDACTED]
Friday, May 09, 2008 3:11 PM

Subject:

[REDACTED]
US v Khadr - Determination and Ruling - D-027

Attachments:

D-027 Determination and Ruling - Khadr.pdf

[REDACTED]
D-027
etermination and Rulir

COL Brownback has directed that the attached materials be forwarded to counsel in US v Jawad and to other interested persons.

V/r,

[REDACTED]
[REDACTED]

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[REDACTED]
[REDACTED]
Subj [REDACTED]
[REDACTED]

Please forward the attached determination and ruling in D-027 to counsel in the case of United States v. Khadr. Please distribute it to other interested persons.

COL Brownback

**UNITED STATES
OF
AMERICA**

**D-031
Defense Notice of Motion to Compel Production of
Physical Evidence**

9 May 2008

v

OMAR AHMED KHADR
a/k/a "Akhbar Farhad"
a/k/a "Akhbar Farnad"
a/k/a "Ahmed Muhammed Khahi"

Determination and Ruling

1. The defense filed this notice of motion on 4 March 2008. The military judge has not at any time required that the defense provide a motion as contemplated by the Rules of Court. The government did not file a response. At an RMC 802 conference on 12 March, on the record on 13 March, and at an RMC 802 conference on 13 March, the government stated that it was searching for physical evidence but had not yet found any. At an RMC 802 conference on 10 April and on the record on 11 April, the government stated that it had found certain physical evidence and will make the evidence available to the defense. At an RMC 802 conference on 7 May and on the record on 8 May, the government stated that it had completed its search and that it had made all physical evidence available to the defense. On the record on 8 May, the defense indicated that it was satisfied that the government had, in good faith, complied to the best of its ability. In the Motion Status Summary, distributed to the parties on 9 May 2008, D-031 carried the notation : "Action complete, If DC want more, they will make a new request. MJ will file a determination in the matter." Other than the original motion filed by the defense, no other pleadings concerning this motion were filed by either party.

2. Documents discussed in paragraph 1 will be contained in the Appellate Exhibit which contains this motion.

3. The commission determines that the government has satisfied the requirements of RMC 701 in connection with this motion. Any further requests by the defense in connection with the subject of this motion will be made in the context of a new discovery request.

4. The commission rules that action by the parties and the commission on this motion is now Final.

Peter E. Brownback III
COL, JA, USA
Military Judge

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

**Notice of Defense Motion
To Compel Production of Physical Evidence**

4 March 2008

1. **Timeliness:** This notice of motion is filed within the timeframe established by the Military Judge's 21 February 2008 e-mail order.

2. **Notice of motion:** On or about 13 March 2008, the defense shall move this Military Commission for an order directing the government to produce the following documents or materials: Any physical evidence seized from the site of the 27 July 2002 firefight at or near Khost, Afghanistan, including, but not limited to, circuit boards, watches, or other materials allegedly used to manufacture explosive devices.

3. **Summary of basis for motion:**

a. The defense seeks production of physical evidence seized from the site of the 27 July 2002 firefight, which it requested from the government on 9 November 2007. (Def. Discovery Req. of 9 Nov 07, ¶ 3(j) (Attachment D to D-025 Def. Mot. to Compel Discovery (Eyewitnesses).) The government alleges, *inter alia*, that Mr. Khadr participated with others in an effort to manufacture explosive devices for use against U.S. forces. The defense should be afforded the opportunity to examine and independently test any physical evidence seized from the site. Such items are therefore material to the preparation of the defense.

b. The government has not produced any physical evidence to date on the basis that it "has provided all relevant physical evidence or photographs thereof known to trial counsel that are material to the preparation of the defense or are intended for use by trial counsel as evidence in the prosecution case-in-chief." (Govt Resp. of 4 Dec 07 to Def. Discovery Req. of 9 Nov 07, ¶ 3(j) (Attachment E to D-025, Def. Mot. to Compel Discovery (Eyewitnesses).) But the government's discovery obligation is not limited to physical evidence "known to trial counsel." Instead, the government is required to produce all physical evidence relating to the charges in this case that are in the possession of any governmental agency. *See* R.M.C. 701(c)(1) (stating trial counsel must produce evidence "within the possession, custody or control of the Government, the existence of which is known or by the exercise of due diligence may become known to trial counsel"); *see also* *Kyles v. Whitley*, 514 U.S. 419, 432, 437, (1995) (prosecutors have an affirmative duty to disclose such evidence and a duty to "learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."); *see also* *United States v. Brooks*, 966 F.2d 1500, 1503 (D.C. Cir.1992) (holding that prosecutor has the obligation to search files of governmental agencies "closely aligned with the prosecution" whenever there is "some reasonable prospect or notice of finding exculpatory evidence.");

United States v. Crivens, 172 F.3d 991, 996 (7th Cir. 1999) (“prosecutors may not simply claim ignorance of *Brady* material”). This duty is particularly important here, where “other government agencies” told prosecutors in the Office of Military Commissions that any exculpatory information would be withheld from the prosecutors. [REDACTED] email of 15 Mar 04 (Attachment I to D-025, Def. Mot. to Compel Discovery (Eyewitnesses)) (“In our meeting with OGA, they told us that the exculpatory information, if it existed, would be in the 10% that we will not get with our agreed upon searches.”).

4. **Oral Argument:** The Defense requests oral argument as it is entitled to pursuant to R.M.C. 905(h) (“Upon request, either party is entitled to an R.M.C. 803 session to present oral argument or have evidentiary hearing concerning the disposition of written motions.”). Oral argument will allow for a thorough consideration of the issues.

5. **Witnesses and evidence:** The defense does not anticipate the need to call witnesses in connection with this motion, but reserves the right to do so should the prosecution’s response raise issues requiring rebuttal testimony. The defense relies on the following as evidence:

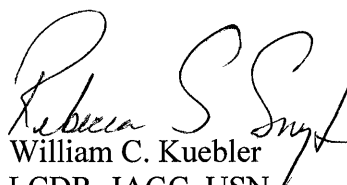
Defense Discovery Request of 9 November 07 (Attachment D to D-025 Defense Motion to Compel Discovery (Eyewitnesses))

Government Response of 4 December 07 to Defense Discovery Request of 9 November 2007 (Attachment E to D-025, Defense Motion to Compel Discovery (Eyewitnesses))

Capt Carr email of 15 Mar 04 (Attachment I to D-025, Defense Motion to Compel Discovery (Eyewitnesses))

6. **Certificate of conference:** The defense and prosecution have conferred. The prosecution objects to the relief requested.

7. **Additional Information:** In making this motion, or any other motion, Mr. Khadr does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this Military Commission to charge him, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in and all appropriate forms.


William C. Kuebler
LCDR, JAGC, USN
Detailed Defense Counsel

Rebecca S. Snyder
Assistant Detailed Defense Counsel

12 April 2008

Subject: Summary - RMC 802 Conference - 10 April 2008

The following is a summary of an RMC 802 conference held at 1000 hours, 10 April 2008, at Guantanamo Bay, Cuba.

1. The following were present:

- a. The Military Judge, COL Peter Brownback
- b. Government Counsel, Maj Jeff Groharing, CPT Keith Petty, Mr. John Murphy, SSG Guadalupe Ona
- c. Defense Counsel, LCDR Bill Kuebler, Ms. Rebecca Snyder, SSG Rebekah Stuyvesant

2. The parties discussed the status of each of the outstanding discovery issues raised and/or litigated at the hearing on 13 March 2008, supplemental defense discovery requests, as well as the motions and notice of motions filed by the defense since the last hearing.

3. Regarding D025, MTC (eyewitnesses), the prosecution has provided the defense a partial list of soldiers present in the vicinity of the firefight resulting in the accused's capture. The prosecution has requested additional information from each unit present at the firefight and will provide any updates we receive.

4. Regarding D050, Notice of Motion (Reports from other Special Operations Units), and D032 (Motion to Compel Documents re Capture & Detention), which subsumes D050, the government stated it has been able to locate a few additional documents related to the firefight and will provide them after appropriate redactions are made. The government has requested all units present to review their files as well as CENTCOM. Several units have advised the government that they do not have any responsive documents. The Government expects a comprehensive response from CENTCOM in the near future. The government stated that military units were not required to conduct death investigations for combat deaths until post-Tillman. The military judge suggested the government contact the "HRC" or like organization to attempt to find a "casualty report" related to SFC Chris Speer's death. Resolution of this discovery issue is still pending.

5. Regarding D026, MTC (documents relating to Charge III), at the March hearing the military judge directed the prosecution to determine whether it could obtain the requested documents. The prosecution has obtained them and does not intend to produce them because they are accurately summarized in the 9/11 Report. The government also contends they are not relevant because whether the alleged co-conspirator disagreed with the tactics of al Qaeda is irrelevant to whether there was an al Qaeda conspiracy. The defense explained that evidence that the individuals with whom Mr. Khadr is alleged to have conspired did not agree that particular attacks should be carried out is relevant. Resolution of this discovery issue is still pending. In response to the military judge's question regarding what the government can prove up in light of the dismissal of language from the conspiracy charge due to the Commission's ruling on D019, the prosecution responded that they intended to show an al Qaeda conspiracy was formed to accomplish certain objectives, that the organization is a conspiracy, that the

accused joined the conspiracy that was already existing in order to do the types of things al Qaeda had previously done. The prosecution explained that their proof would include evidence regarding the 9/11 attacks, the USS COLE Bombing, the embassy attacks, etc., and that this evidence goes to the accused's knowledge of what he joined. In response to the military judge questioning what the 9/11 attacks have to do with the accused since he is alleged to have joined the conspiracy in June 2002, the prosecution explained that it shows that the accused knew what kinds of things al Qaeda did when he joined the conspiracy. The defense stated that the government's proffer suggests that it still intends to prove liability based on a criminal enterprise theory; but the government must show a specific agreement to commit certain object offenses, which makes the documents even more relevant after the military judge's ruling on D019. The defense explained that it has established more than a baseline of materiality regarding the documents. Resolution of this discovery issue is still pending.

6. Regarding D027, MTC (Sgt C Docs), and D034 MTC (Bagram Abuse Investigation), the government produced 5132 pages to the defense on 3 April, which are all but a few subparts of the investigation. The defense will review the documents and notify the commission if there are any additional issues relating to these motions.

7. Regarding D029, MTC (Khadr's Statements), the government has produced three unclassified summaries approved by the Military Judge following an MCRE 505 hearing. The government intends to produce four more documents. There will be a summary produced in lieu of classified information for another one of those documents after an MCRE 505 hearing, which will have to be held sometime after this week. Resolution of this discovery issue is still pending.

8. Regarding D030, MTC (Docs re Davis Investigation), the government filed a motion to reconsider which will be addressed on the record tomorrow.

9. Regarding D031, Notice of Motion (Physical Evidence), the prosecution has learned that the original video found at the compound is located in an evidence locker at JTF. The prosecution was also advised that an English Bible that was purportedly found at the scene of the firefight is also located in the evidence locker. The prosecution will make this evidence available to the defense. Resolution of this discovery issue is still pending.

10. Regarding D033, Notice of Motion (US-Canadian Correspondence), State department has found some relevant documents, which the prosecution will look at next week. Resolution of this discovery issue is still pending. The defense counsel noted that the Canadian Government representative present for the hearing stated that Canada has documents relevant to the case and wants to know what level of protection the documents should receive if released to defense counsel pursuant to the Canadian litigation in Mr. Khadr's case. Resolution of this discovery issue is still pending.

11. Regarding D035, Notice of Motion (Interrogators ID), the government intends to file a motion to reconsider.

12. Regarding D036, MTC (Manuals & SOPs), the government has numerous manuals and SOPs (approximately 675 pages) in effect during the time periods that the accused was interrogated. The government will continue to gather all manuals and SOPs that would have been in effect during interrogations of the accused.

13. Regarding D048, Notice of Motion (SERE SOP), the government said that it did not intend to produce this document because it was never adopted as policy, so it is not relevant. There is also an additional interrogation manual the government has reviewed and does not intend to produce. Resolution of this discovery issue is still pending.

14. Regarding D037, Notice of Motion (Videos, Audio, Photos), the government can only find one video, which is the video of the Canadian interrogation. It is in the process of making a copy of this video for the defense. The government did not locate any photos or videos taken in connection with changing the accused's bandages in Bagram or during medical exams. Resolution of this discovery issue is still pending.

15. Regarding D038, Notice of Motion (Classified Report), the government has produced an unclassified summary to the defense.

16. Regarding D041, MTC (██████ Documents), the prosecution has an MCRE 505 filing for the military judge today that relates to this motion. It is a declaration that says the documents the defense seeks do not contain derogatory information. The defense explained that it also requested information relating to ██████'s training and experience. The government stated that ██████ has agreed to speak to the defense and that he would answer some questions about this, but may be limited in what he can say. The defense explained that because ██████ had an incentive to describe his training and experience in such a way as to make his conclusions regarding who threw the grenade credible, it was important to be able to independently verify ██████'s claims regarding his training and experience. The military judge stated the defense could raise this issue after talking to ██████.

17. Regarding D042, MTC (Intelligence Reports re Compound), the prosecution stated the defense has all the written intelligence reports that they have been able to locate after making requests of all appropriate USG agencies. It intends to produce an unclassified summary of classified information regarding the intelligence that led U.S. forces to the compound where the accused was captured after a protective order is entered regarding this document. Resolution of this discovery issue is still pending.

18. Regarding D043, MTC (DIMS), the prosecution is in the process of gathering the information. Resolution of this discovery issue is still pending.

19. Regarding D044, MTC (Various Individuals), the defense filed the motion on 7 April 2008, so the government is not yet prepared to respond. The government will respond in writing. Resolution of this discovery issue is still pending.

20. Regarding D045, Notice of Motion (al Qaeda membership lists), the defense filed it on 7 April 2008, so the government is not yet prepared

to respond. The government will respond in writing. Resolution of this discovery issue is still pending.

21. Regarding D046, Notice of Motion (Identity of Co-conspirators), the defense filed it on 7 April 2008, so the government is not yet prepared to respond. The government will respond in writing. Resolution of this discovery issue is still pending.

22. Regarding D047, Special Request for Relief to Strike Additional Language from Charge III based on the ruling for D019 and filed on 9 April 2008, the government will respond in writing. Resolution of this discovery issue is still pending.

23. Regarding D049, MTC (LIFG), the government stated that the request was overbroad, the defense had not described how the requested documents would material to the preparation of the defense and that it would respond in writing. Resolution of this discovery issue is still pending.

24. Regarding D051, Notice of Motion (Recruitment of Child Soldiers), the defense filed it on 9 April 2008, so the government is not yet prepared to respond. The government will respond in writing. Resolution of this discovery issue is still pending.

25. Regarding D052, Notice of Motion (SOPs re Minors), the government stated that it is expending tremendous resources looking for documents. The defense explained that if the government has detained and treated the accused in a manner that does not comply with applicable SOPs, that fact is admissible as mitigating evidence for sentencing. The military judge stated that he would give the prosecution an opportunity to respond in writing.

26. Regarding D053, Notice of Motion (Investigator Notes), the prosecution stated that there is no reason to produce the notes since they are incorporated in the Form 40s. The military judge stated that the prosecution could respond in writing.

27. The defense inquired as to whether the Notices of Motion would become part of the record and made publicly available. The military judge said that they would be. The military judge invited the defense to let him know for which motions or notices of motions the parties had completed the filings that had not yet been released.

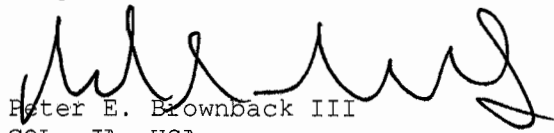
28. The defense asked if the temperature in the courtroom could be raised because counsel and the client were extremely cold during the last hearing. The military judge asked Capt Petty to handle the issue.

29. The defense noted that after the last hearing, discovery materials were taken from the client's box where his commissions legal materials are kept. When he asked for the documents, he was brought an empty box. The defense explained that the detainees are allowed to have access to habeas legal materials without transport, but to see commissions legal materials they must be transported and shackled. The prosecution explained that they had been told about a stamping policy whereby legal materials could be marked as such, but that stamping legal materials was not required. The defense also explained that the JTF intended to implement a policy that all notes taken during client

meetings are classified, but that there was no mechanism to "declassify" the notes. The military judge asked Capt Petty to obtain a copy of the stamping policy, the classification of notes policy, and the policy as to what documents can be reviewed where. Captain Petty asked the defense to approach him regarding any problems they are having related to meeting with their client or preparing a defense.

30. The defense stated that it intended to file another discovery motion in which it would seek documents relating to the principle of *tu quoque*.

31. This summary was agreed to by defense counsel (on 11 April) and government counsel (on 12 April) before it was signed by the military judge.



Peter E. Brownback III
COL, JA, USA
Military Judge

CF: All attendees.

13 March 2008

The following is a summary of an RMC 802 conference held at 1730 hours, 12 March 2008, at Guantanamo Bay, Cuba.

1. The following were present:

- a. The Military Judge, COL Peter Brownback
- b. Government Counsel, CPT Petty, Mr. John Murphy
- c. Defense Counsel, LCDR Kuebler, Ms. Rebecca Snyder, SSG Rebekah Stuyvesant

2. The parties discussed the status of each of the discovery issues raised in motions and notice of motions D025 through D038. Regarding D025, MTC (eyewitnesses), the prosecution stated that it was in the process of fine tuning a list of eyewitnesses present at the 27 July 2002 firefight that it will give the defense tomorrow. Initially, the prosecution stated that the list was prepared by searching the files of the trial counsel, case investigator, CITF case agent and case paralegal. The prosecution later clarified that it has obtained information from OGAs in preparing this list. The prosecution stated that the defense will not necessarily get the names of each eyewitness, but that the defense will be given a means to speak with each eyewitness.

3. Regarding D026, MTC (documents relating to Charge III) the parties have not reached an agreement on this motion. The government was unsure whether it could obtain the documents referenced in Attachment A to D026. The military judge directed the government to determine whether it could obtain those documents.

4. Regarding D027, MTC (documents regarding investigation & prosecution of Sgt []), the government stated that it intended to comply with the defense discovery request.

5. Regarding D028, Motion to Depose LtCol W, the parties have not reached an agreement on this motion. The military judge asked the defense why the defense believes it entitled to depose LtCol W. The defense explained that the information sought from LtCol W will impact further discovery in the case and is vital to reconstruct the events as one or two of the three reports he wrote were compiled immediately after the 27 July firefight and are based on LtCol W's interviews of many witnesses. The defense explained it wanted to ask LtCol W who those witnesses were so that it could attempt to talk to them prior to trial. The defense also explained that it wanted to explore what led to LtCol W altering and apparently backdating the last report. The prosecution stated that while it could not guarantee that LtCol W would not deploy and be unavailable at trial, it did not think that was likely and it intended to call him as a witness. In responding to a question from the military judge, the prosecution stated that it would prefer to not be able to admit LtCol W's statements at trial if he were not available to testify than for the defense to depose him prior to trial.

6. Regarding D029, MTC (accused's statements), the government stated that summaries of additional statements were forthcoming. It explained that it could not find the first several statements the defense specified in its motion. The government also explained that it has handwritten notes (in short-hand) containing the accused's statements that it has not produced to the defense because it has determined that they are not relevant or material.

7. Regarding D030, MTC (documents relating to investigation of Col Davis complaint), the parties have not reached an agreement on this motion. The military judge told the defense to review the Tate document available on the DoD website. In response to the military judge, the government explained that it could make the requested documents available to the defense.

8. Regarding D031, NOM (physical evidence), the government stated that it has done a thorough search and has not located any physical evidence that the defense does not have.

9. Regarding D032, NOM (documents regarding capture & detention), the defense clarified that it is requesting documents such as message traffic, casualty reports, and incident reports. The military judge directed the government to determine what unit or units and US elements were involved in the firefight, and whether there was an after action or other report of activity prepared by any of them. The military judge also instructed the government to search for relevant message traffic from 27-30 July 2002.

10. Regarding D033, NOM (communications between US & Canada), the government explained that it had a search performed for the requested documents at the State Department because it thought this agency was the most likely to contain relevant documents and that none were found. The defense explained that there must be some communications because something caused Canada to generate the response attached to D033 as Attachment A. The defense suggested that the communications might have been through US intelligence agencies rather than the State Department. The government then explained that it had conducted a search at other agencies as well and did not find the requested documents.

11. Regarding D034, MTC (documents regarding investigation of detainee abuse in Bagram), the government explained that it is going to produce documents in connection with D027, which should be sufficient. The defense explained that at least 27 people in one unit had been investigated for detainee abuse at Bagram so the documents relating to D027 may not be sufficient to satisfy the document request at issue in D034. The government was unsure of the scope of the investigation relating to D027 and thought that it might have been one large detainee abuse investigation, rather than multiple investigations, and said that it would check on that.

12. Regarding D035, NOM (interrogators), the government explained that it has given the defense all the names of the accused's interrogators. The defense explained that it has numbers, not names, for many of the interrogators, and that there are interrogators who are not identified in the many of the interview summaries, interrogation reports, etc. The defense also explained that it had just become aware of one potential interrogator through a recent newspaper article that was not contained in the discovery. The government explained that it would look further into what had been done to identify the accused's interrogators.

13. Regarding D036, NOM (SOPs & interrogation manuals), in Major Groharing's absence, Capt Petty was unsure of whether these items had been looked for and stated he would check.

14. Regarding D037, NOM (videos, audio recordings, photos of accused), the government stated that it was aware of only one video the defense did not have and it was working to obtain authorization to produce it to the defense. The defense stated that many photos of the accused had been taken, many of them in connection with medical care, and asked whether the government had them. It

stated it did not, but that it was unsure of whether the medical records contained those photos. The government explained that both the defense and government have done everything that is required to obtain the medical records, but that JTF had just informed Capt Petty and LCDR Kuebler that it would not release the medical records without authorization from the defense that JTF could give the records to the prosecution. The government also explained that it doesn't know whether the medical records JTF has include medical records from Bagram or other sources because JTF had not yet responded to the government question as to the scope of the records.

15. Regarding D038, NOM (classified report), the government stated that it will produce to the defense an unclassified summary of the report shortly.

16. The defense explained that it had submitted two supplemental discovery requests to the government, and the government explained that it submitted a discovery request to the defense. The military judge emphasized that he wanted to resolve the discovery issues and encouraged the parties to discuss the requests.

17. The parties discussed several administrative issues, including displaying attachments to the motions on the video screens in the courtroom, referencing attachments, publishing motions and responses on the DoD website.

18. The defense also told the military judge that it may be necessary to have a closed session in the event that it needed to discuss information contained in the classified documents attached to the motions. The military judge stated that the defense should refer to the information by paragraph and that there would be no need to have a closed session.

19. The defense explained that the convening authority had requested more information before deciding whether to grant the defense request for an expert consultant relating to al Qaeda. In the event the request is denied, the defense will need to litigate the expert request. The defense stated that if the convening authority denies the expert request, then the defense will file a motion to continue the deadline for responding to P003 as expert assistance is needed to respond.

20. The defense noted that the government's complaints in responding to the D024 (defense motion for to continue evidentiary motions deadline) that the defense has spent time going TAD rather than preparing for trial raises a question of whether counsel is competent since the government alleges they are not preparing for trial. The government responded that its response says the defense is competent and that it was not raising this ethical issue.

21. Any issues requiring a decision were withheld until the hearing tomorrow. The MJ urged both parties to talk to each other about discovery issues and try to resolve them amongst themselves. The military judge also urged both parties to come up with a trial schedule. Neither party had anything further.

22. This summary was agreed to by defense counsel and government counsel before it was signed by the military judge.

Peter E. Brownback III
COL, JA, USA
Military Judge

14 March 2008

The following is a summary of an RMC 802 conference held at 1825 hours, 13 March 2008, at Guantanamo Bay, Cuba.

1. The following were present:

- a. The Military Judge, COL Peter Brownback
- b. Government Counsel, MAJ Groharing, CPT Petty, Mr. John Murphy, SSG Ona
- c. Defense Counsel, LCDR Kuebler, Ms. Rebecca Snyder, SSG Rebekah Stuyvesant

2. The military judge reviewed each motion again to ensure that each side understood which motions he intended to rule on. Regarding D025, MTC (eyewitnesses) the military judge will not rule at this point. The prosecution is in the process of fine tuning a list of eyewitnesses present at the 27 July 2002 firefight that it will give the defense. The prosecution will provide names of people, but may not be able to provide units or contact information on some of the personnel.

3. Regarding D026, MTC (documents relating to Charge III), the military judge will not rule at this point. The prosecution is working on trying to obtain the conspiracy documents.

4. Regarding D027, MTC (documents regarding investigation & prosecution of Sgt []), the military judge will not rule at this point. The government stated that it intended to comply with the defense discovery request.

5. Regarding D028, motion to depose LtCol W, the military judge will rule by tomorrow.

6. Regarding D029, MTC (accused's statements), the military judge will rule by tomorrow.

7. Regarding D030, MTC (documents relating to the investigation of Col Davis complaint), the military judge will rule by tomorrow.

8. Regarding D031, NOM (physical evidence), the military judge will not rule at this point because the government says that it does not have any physical evidence not produced to the defense.

9. Regarding D032, NOM (documents regarding capture & detention), the military judge will not rule on the motion at this point. But the military judge instructed the government to comply with what was put on the record at the hearing today regarding searching for message traffic, etc. The search should cover 27 July - 8 August 2002.

10. Regarding D033, NOM (communications between US & Canada), the military judge will not rule at this point. The government must comply with what was put on the record when searching for communications with Canada. The search should cover 27 July through 31 December 2002.

11. Regarding D034, MTC (documents regarding investigation of detainee abuse in Bagram), the military judge will not rule at this point. The government

explained that it is going to produce documents in connection with D027 and that D027 is subsumed by D034.

12. Regarding D035, NOM (identity of interrogators), the military judge will rule by tomorrow.

13. Regarding D036, NOM (SOPs & Manuals), the military judge will not rule at this point. The government must look for any SOPs & interrogation manuals, other than the SOP mentioned in conjunction with D034/D027.

14. Regarding D037, NOM (videos, audio recordings, photos of accused), the military judge will not rule at this point.

15. Regarding D038, NOM (classified report), the military judge will not rule at this point since the government will provide to the defense an unclassified summary of the report shortly.

16. Regarding D024, defense motion for continuance of evidentiary motions deadline, the military judge will rule by tomorrow.

17. The government will provide the defense with the medical records tomorrow, 14 March 2008.

18. The military judge explained that the defense can raise further issues with the military judge if the defense is not satisfied with the documents produced by the government.

19. The government raised an issue regarding the release of filings. It said that it appears that the defense is releasing their filings before they are filed with the Court. The defense explained that it had the understanding that it could discuss the contents of their filings with people outside the defense team prior to the court releasing the filing to the public as long as it did not divulge FOUO information. The military judge stated that he is troubled with a motion being released before it reaches military judge's hands. But the military judge explained the defense may call up the press and let them know a motion would be sent out the next day regarding XYZ and that it thinks it is entitled to the requested relief because of abc.

20. This summary was agreed to by defense counsel and government counsel before it was signed by the military judge.

Peter E. Brownback III
COL, JA, USA
Military Judge

The following is a summary of an RMC 802 conference held at 1700 hours, 7 May 2008, at Guantanamo Bay, Cuba.

1. The following were present:

- a. The Military Judge, COL Peter Brownback
- b. Government Counsel, Maj Jeff Groharing, CPT Keith Petty, SSG Guadalupe Ona
- c. Defense Counsel, LCDR Bill Kuebler, Ms. Rebecca Snyder, Mr. Nathan Whitling, SSG Rebekah Stuyvesant
- d. Col Parrish was present, but did not participate in the conference

2. The parties discussed the status of each of the outstanding discovery motions and notice of motions filed by the defense.

3. Regarding D025, MTC (eyewitnesses), the prosecution has provided an updated list identifying individuals who were present at the firefight resulting in the accused's capture. The Government is not going to search for additional information absent a specific defense request demonstrating how locating a particular individual is necessary. The government has previously provided statements for eight additional individuals not listed on the list provided to the Defense. If the defense wishes to speak to these witness, it must notify the government.

4. Regarding D029, MTC (Mr. Khadr's statements), the defense explained that the government has produced approximately 144 unclassified summaries of interrogations of Mr. Khadr. The government allowed the defense to review notes for 59 unclassified interrogation summaries pursuant to the military judge's order. The defense explained that no handwritten notes have been provided for the first 30 interrogation summaries. The government explained that the interrogation summaries from Bagram are considered to be notes even though they are typewritten. The government has asked CENTCOM for handwritten notes from interrogations, has received some negative replies and is waiting to receive the rest of the replies.

5. Regarding D031, Notice of Motion (Physical Evidence), the government has not located any more physical evidence. The original bomb-making video is located in GTMO, but can't be played here because it is 8mm film. The flag is located in Crystal City and the Bible is located at Ft Belvoir.

6. Regarding D032, Notice of Motion (Docs regarding capture & detention), the government intends to produce additional reports and documents from the other special operations group next week.

7. Regarding D033, Notice of Motion (US-Canadian Correspondence), the government explained that Mr. Murphy completed reviewing the documents at the State Department on Friday that it will disclose to the defense next week. Initially, the government asked for documents regarding the accused and the 27 July 2002 firefight and the State Department provided a small number of documents related to the accused, which the government determined were not discoverable to the defense. After the March session, the government asked the State Department to search for documents containing communications between Canada and the U.S. during the relevant period. They produced documents that Mr. Murphy reviewed last week. The government said the State Department has a number of documents regarding the accused's father that the government does not intend to produce. The defense stated that this was the first time they had heard the State Department has such documents and that the defense requested

documents relating to Ahmed Said Khadr, the accused's father and an alleged co-conspirator, in November 2007 in connection with Charge III. The defense also explained that documents regarding Ahmed Said Khadr and his connections to al Qaeda and those alleged to be involved with al Qaeda may be relevant evidence in mitigation.

8. The military judge issued a classified protective order regarding D035, Notice of Motion (identification of interrogators), today.

9. Regarding D036, MTC (Manuals & SOPs), the government does not intend to produce any more manuals or SOPs.

10. Regarding D037, MTC (video, audio, photos), the government has allowed the defense to view the DVDs of Mr. Khadr's interrogations. The government is attempting to improve the sound on one of the DVDs as was done for other DVDs. The defense asked whether the DVDs will be declassified once the interrogators' faces are covered up and explained that the content of the interrogations exists in unclassified documents. The defense stated that it would like to show the DVDs to an expert. The government stated that it would try to declassify them or obtain permission for an expert to view them.

11. D038, MTC (classified report), is complete.

12. Regarding D041, MTC (documents relating to OC1), the defense will review the motion in light of protective order number 4.

13. Regarding D042, MTC (intel reports), the defense will review the motion in light of protective order number 4.

14. Regarding D043, MTC (DIMS), the government agrees that portions of the DIMS reports are relevant and asked the Defense to narrow their request. The defense was viewed two binders of DIMS and flagged the pages they needed in one of the binders. For the other binder, the Defense explained that the nature of the documents and inability to compare them to their files at their office makes reviewing the documents away from their office difficult and time consuming. The government advised that the JTF has not authorized release of the documents to the Defense without redactions to names of guards and other information.

15. The defense requested oral argument on D044, D045, D046, D048, D049, D050, D051, and D053. Neither the defense nor government desires to argue D047.

16. Regarding D052, MTC (US SOPs re treatment of children), the government will produce one CENTCOM document to the defense and JTF is still looking for responsive documents. In light of this, the parties do not intend to argue this motion tomorrow.

17. Regarding D054, MTC (BTIF inspection), MAJ Kinnenbeck completed the BTIF tour. The government has received 8 - 10 classified photos from BTIF personnel that according to BTIF personnel, don't bear any resemblance to the BTIF as it looked when the accused was there. The government will allow the defense to view the documents. The military judge considers D054 to be complete and that the defense should inform the judge if there is anything further on this motion.

18. Regarding D055, Motion to Amend Charge IV, the parties intend to argue it tomorrow. The prosecution filed a response that the military judge did not receive. The government will ensure it is sent to the military judge.

19. Regarding MJ012, Brief regarding the Relevance of Pre-June 2002 Activities, the military judge has received five documents that are briefs, responses, and replies that are still being reviewed.

20. The defense made the military judge aware that they submitted a supplemental discovery request to the government earlier this week based on discovery the defense has received in the last few weeks.

21. The defense explained to the military judge that they have been interviewing child experts and psychologists. The defense does not have any experience with juvenile justice issues and believes it would be more efficient to bring on a civilian attorney with juvenile justice experience than for the defense to take the time necessary to become competent to litigate juvenile related issues. The defense are currently working through funding for the civilian attorney issues, but wanted to give the judge notice that a new counsel may be at the next hearing.

22. The military judge stated that he will set a date for evidentiary motions to be due on 28 May 08, but if more time is needed and/or it is necessary to incorporate outstanding discovery issues, the parties should ask for relief.

23. The military judge stated that he will set the evidentiary motions hearing for 18-19 June 08.

24. The government requested the military judge issue a trial date.

25. The Defense objected to issuance of a trial date.

26. This summary was agreed to by defense counsel and government counsel before it was signed by the military judge.

Peter E. Brownback III
COL, JA, USA
Military Judge
8 May 2008

Khadr - Motions Status Summary a/o 9 May 2008
V2 after RMC 802 Conference at 0830

Includes information from Filings Inventory, RMC 802 Conferences, and Transcripts

P-001 Complete
P-002 Complete
P-003 Pending – a) CA action on witness request, b) MJ ruling on MJ-012
P-004 Complete
P-005 Complete
P-006 Complete

D-001 Complete
D-002 Complete
D-003 Complete
D-004 Complete
D-005 Complete
D-006 Complete
D-007 Complete
D-008 Complete
D-009 Complete
D-010 Complete
D-011 Complete
D-012 Complete
D-013 Complete
D-014 Complete
D-015 Complete
D-016 Complete
D-017 Complete
D-018 Complete
D-019 Complete
D-020 Complete
D-021 Complete
D-022 Complete
D-023 Complete
D-024 Complete

D-025 Action complete. If DC want more, they will make a new request. MJ will file a determination in the matter.

D-026 Complete

D-027 Action complete. If DC want more, they will make a new request. MJ will file a determination in the matter.

D-028 Complete

D-029 TC waiting for final confirmation from CENTCOM that no subordinate units/agencies have any other notes. Once received, TC will advise DC.

D-030 Complete

D-031 Action complete. If DC want more, they will make a new request. MJ will file a determination.

D-032 Government still working on finding post-action reports. Gov't looking for casualty reports. This motion subsumes D-050. ROT 11 Apr 08. **Gov't believes that some report will be declassified next week. ROT 8 May.**

D-033 Government was to review DOS documents week of 15 April. ROT 11 Apr 08. **Mr. Murphy has completed review and should get documents next week. TC will advise DC of what documents it is not providing. TC stated some documents re Khadr's father – DC demanded research on them. TC will search and advise. ROT 8 May 08.**

D-034 This motion is subsumed by D-027. ROT 11 Apr 08. **Action complete. If DC want more they will make a new request. MJ will file a determination in the matter.**

D-035 MJ issued ruling. Government email dated 2 April 2008 said it was going to file motion to reconsider. Still not received. ROT 11 Apr 08. **Government will file a classified request for reconsideration in Gitmo o/a 6 May – TC – 30 Apr. TC filed classified request for reconsideration 6 May, not signed. MJ signed revised order 7 May. Action complete.**

D-036 Government is still searching for Manuals and SOPs. ROT 11 Apr 08. **Parties still discussing OGA manuals. TC/DC talk re submitting written interrogatories thru TC to OGA re certain techniques. ROT 8 May.**

D-037 Government trying (a/o 11 Apr) to make copy of one video for DC. Government did not locate any other videos or photos. ROT 11 Apr 08. **Still tech problems with face changing on tape. Plus TC, at DC request, trying to get video declassified if tech problem solved. ROT 8 May.**

D-038 Government gave unclassified version of report. DC will advise if it wants more. ROT 11 Apr 08. **Action complete. MJ will file a determination in the matter.**

D-039 Complete

D-040 Complete

D-041 No action by MJ until DC reviews in light of Pro Ord #4. ROT 11 Apr 08. **DC still reviewing in light of Pro Ord #4. ROT 8 May.**

D-042 No action by MJ until DC reviews in light of Pro Ord #4. ROT 11 Apr 08. **DC still reviewing in light of Pro Ord #4. ROT 8 May.**

D-043 No response from government. Will one be furnished? ROT 11 Apr 08. DC - 27 Apr 08 indicates that gov't has provided discovery. Problems with means of discovery. TC - 30 Apr - will work w/DC w/in constraints of maintaining control of documents. **Problem mutated. MJ issued oral ruling, will issue final ruling in writing. Ruling include furnishing DIMS Binder 2 by 22 May 1700 hours. TC will discuss with JTF need to cooperate w/information requests or face lengthy delay in trial. ROT 8 May.**

D-044 Response filed. a) Does DC want to reply? No - DC 29 Apr. b) Does either side want further oral argument? Yes - DC 30 Apr. **Both sides argued this motion w/D-049. MJ will issue ruling. ROT 8 May.**

D-045 Response filed. a) Does DC want to reply? No - DC 29 Apr. b) Does either side want further oral argument? Yes - DC 30 Apr. **Both sides argued. MJ will issue ruling. ROT 8 May.**

D-046 Response filed. a) Does DC want to reply? No - DC 29 Apr. b) Does either side want further oral argument? Yes - DC 30 Apr. **Both sides argued. MJ will issue ruling. ROT 8 May.**

D-047 Response filed. a) Does DC want to reply? No - DC 29 Apr. b) Does either side want further oral argument? No - DC 29 Apr. **With MJ for decision.**

D-048 Response filed. a) Does DC want to reply? No - DC 29 Apr. b) Does either side want further oral argument? Yes - DC 30 Apr. **Both sides argued. MJ will issue ruling. ROT 8 May.**

D-049 Response filed. a) Does DC want to reply? No - DC 29 Apr. b) Does either side want further oral argument? Yes - DC 30 Apr. **Both sides argued this motion w/D-044. MJ will issue ruling. ROT 8 May.**

D-050 This motion is subsumed by D-032. ROT 11 Apr 08.

D-051 Response filed. a) Does DC want to reply? No - DC 29 Apr. b) Does either side want further oral argument? Yes - DC 30 Apr. **Both sides argued. MJ will issue ruling. ROT 8 May.**

D-052 No response received. Does either side want oral argument? Yes - DC 30 Apr. Government working to find documents - TC 30 Apr. **No argument. TC has found at least two documents. Still searching. ROT 8 May.**

D-053 Response filed. a) Does DC want to reply? No – DC 29 Apr. b) Does either side want further oral argument? Yes – DC 30 Apr. **Both sides argued. MJ will issue ruling. ROT 8 May.**

D-054 Complete.

D-055 Motion filed. Response **received. Both sides argued. MJ will issue ruling. ROT 8 May.**

MJ-001 Complete

MJ-002 Complete

MJ-003 Complete

MJ-004 Complete

MJ-005 Complete

MJ-006 Complete

MJ-007 Complete

MJ-008 Complete

MJ-009 With MJ for decisions on trial schedule. **MJ set certain dates on the record. Will supplement with formal ruling. Both sides argued. ROT 8 May.**

MJ-010 Complete

MJ-011 Complete

MJ-012 Parties have submitted briefs, **responses to briefs, and DC reply to response. MJ declined to hear argument on motion on 8 May.**

Attachments: D-031 - Determination and Ruling - Khadr.pdf

 $v/r,$ $V/r,$

1

**UNITED STATES
OF
AMERICA**

**D-034
Defense Motion To Compel Discovery (Documents
Relating to Investigation and Prosecution of
Detainee Abuse)**

9 May 2008

v

OMAR AHMED KHADR

a/k/a "Akhbar Farhad"

a/k/a "Akhbar Farnad"

a/k/a "Ahmed Muhammed Khahi"

Determination and Ruling

1. This motions was filed on 4 March 2008. The government did not respond, but it did provide an email on 10 March stating that it intended to comply with the request. At an RMC 802 conference on 10 April and on the record on 11 April, the parties agreed that this motion was subsumed by D-027. In the Motion Status Summary, distributed to the parties on 9 May 2008, D-034 carried the notation : "Action complete, If DC want more, they will make a new request. MJ will file a determination in the matter." Other than the original motion filed by the defense, no other pleadings concerning this motion were filed by either party.
2. Documents discussed in paragraph 1 will be contained in the Appellate Exhibit which contains this motion.
3. The commission determines that the government has satisfied the requirements of RMC 701 in connection with this motion. Any further requests by the defense in connection with the subject of this motion will be made in the context of a new discovery request.
4. The commission rules that action by the parties and the commission on this motion is now Final.

Peter E. Brownback III
COL, JA, USA
Military Judge

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

**Defense Motion
To Compel Discovery**

(Documents Relating to Investigation and
Prosecution of Detainee Abuse)

4 March 2008

1. **Timeliness:** This motion is filed within the timeframe established by the Military Commission Trial Judiciary Rules of Court and the Military Judge's e-mail order of 21 February 2008.

2. **Relief Sought:** The defense respectfully requests that this Commission order the government to produce the requested discovery: all materials within the possession, custody or control of the government relating to the investigation and prosecution of abuse and mistreatment of detainees at Bagram Airbase, Afghanistan (hereinafter "Bagram"), between July 2002 and November 2002.

3. **Overview:**

a. The defense seeks production of information relating to detainee abuse that occurred at Bagram at or near the time that the accused was confined there. Mr. Khadr was detained at Bagram from July 2002 until the end of October 2002. Mr. Khadr was subjected to repeated, coercive interrogations at Bagram (as a critically wounded, 15-year old boy), which allegedly resulted in inculpatory statements on which the government intends to rely at trial. At least one of Mr. Khadr's principal interrogators was prosecuted for abusing detainees. This was part of a larger pattern of detainee abuse at Bagram, which resulted in the deaths of two detainees. The government investigated these allegations as part of criminal investigations into misconduct of Bagram interrogators. The defense must have access to these materials if it is to corroborate Mr. Khadr's allegations of abuse, investigate possible bases for suppressing his statements, and, if those statements are admitted, introduce evidence bearing on their reliability.

4. **Burden of Proof:** The Defense bears the burden of establishing, by a preponderance of the evidence, that it is entitled to the requested relief. R.M.C. 905(c)(2)(A). The Defense, however, need not show by a preponderance of the evidence that the requested discovery is material. *See generally, Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (On review, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.").

5. **Facts:**

a. On 9 November 2007, the defense submitted to the government a request for discovery that sought, among other items, the following:

(1) “All materials within the possession, custody and control of the government relating to the investigation and/or prosecution of other individuals for detainee mistreatment or abuse at Bagram Airbase, Afghanistan, between July 2002 and November 2002.”

(2) “All documents or information regarding any mistreatment of Mr. Khadr at the hands of U.S. or Allied Armed Forces, civilians or contractors of which the government is aware. This includes any recorded allegation of such mistreatment made by the accused, any witness to the mistreatment, or any non-governmental organization (e.g., the International Committee for the Red Cross) that purports to document allegations of mistreatment. M.C.R.E. 304, R.M.C. 701(e).”

(3) “[A]ll documents related to the conditions under which the accused was held from the time of his capture to the present date. This includes, but is not limited to, all written orders, memoranda, directives, SOPs, or other documents that purport to direct agents of the US government in the manner in which the accused should be treated, fed, housed, and given medical attention. This also includes any information relating to mistreatment, abuse, inhumane treatment or conditions, degrading treatment or conditions, cruel or oppressive treatment or conditions, or torture, that is known, suspected, or alleged to have occurred since the date of the accused’s capture in Afghanistan. R.M.C. 701(e); R.M.C. 701(c)(1).” (*See* Def. Discovery Req. of 9 Nov 07.)

b. On 4 December 2008, the prosecution denied the defense request, claiming that the requested information was either “not relevant,” not otherwise within the scope of discovery, or that any materials responsive to the request had been previously provided to the defense. (*See* Gov’t Resp. to Def. Discovery Req. of 4 Dec 07.)

c. Materials provided to the defense in discovery show that at least one of Mr. Khadr’s principal interrogators (Sgt. C) was prosecuted for detainee abuse while stationed at Bagram. (*See* Def. Mot. to Compel Discovery (Sgt. C) and attachments submitted in support thereof.) (hereinafter “Sgt C Mot.”). Other documents provided in discovery, and indeed, numerous open-source media accounts, show that Sgt C’s conduct was part of a larger pattern of abuse and maltreatment of Bagram detainees, which was investigated by the U.S. Government. (*See* Sgt C Mot., attachment B.)

6. Argument:

a. The M.C.A., R.M.C., Regulations for Trial by Military Commission, the Due Process Clause and International Law Require Disclosure of Documents Relating to the Investigation of Allegations of Detainee Abuse at Bagram

(1) The MCA and Rules and Regulations Governing Military Commissions Require Disclosure

(i) The M.C.A. states that “Defense counsel in a military commission under this chapter shall have a reasonable opportunity to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense.” *See* 10 U.S.C. § 949j. The rules and regulation echo the statute. *See* R.M.C. 703(a) (“The defense shall have reasonable opportunity

to obtain witnesses and other evidence as provided in these rules.”); Regulation for Trial by Military Commissions 17-2(a) (“Pursuant to 10 U.S.C. § 949j, the defense counsel in a military commission shall have a reasonable opportunity to obtain witnesses and other evidence as provided by R.M.C. 701-703, and Mil. Comm. R. Evid. 505.”).

(ii) Rule for Military Commission (“R.M.C.”) 701(c)(1) requires the government to permit the defense to examine documents and things “within the possession, custody, or control of the Government, the existence of which is known or by the exercise of due diligence may become known to trial counsel, and *which are material to the preparation of the defense* or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial.” (Emphasis added). The Discussion accompanying R.M.C. 701(c) instructs the military commission judges to look to *United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989), which applied Federal Rule of Criminal Procedure 16¹ governing discovery in the context of the Classified Information Procedures Act (CIPA), for the proper materiality standard. In *Yunis*, the court ruled that the defendant was entitled to “information [that] is at least ‘helpful to the defense of [the] accused.’” *Id.* at 623 (quoting *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957)); *see also United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1993) (“materiality standard is not a heavy burden”) (internal quotations omitted); *United States v. Gaddis*, 877 F.2d 605, 611 (7th Cir. 1989) (defining material evidence as evidence that would “significantly help [] in ‘uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment and rebuttal’”) (quoting *United States v. Felt*, 491 F.Supp. 179, 186 (D.D.C. 1979)). Thus, the materiality standard set forth in R.M.C. 701(c) requires the prosecution to turn over any information that is “at least helpful to the defense.” In addition, R.M.C. 701(e)(1) requires the government to disclose “the existence of evidence known to the trial counsel which reasonably tends to ... [n]egate the guilt of the accused of an offense charged.”

(iii) The Military Commission Rules of Evidence (“M.C.R.E.”) explicitly acknowledge the materiality of records such as those Mr. Khadr requests. M.C.R.E. 304(a)(1) provides that “[a] statement obtained by use of torture shall not be admitted into evidence against any party or witness, except against a person accused of torture as evidence that the statement was made.” M.C.R.E. 304(c) similarly places restrictions on the admission of “statements allegedly produced by coercion,” providing in relevant part that:

When the degree of coercion inherent in the production of a statement offered by either party is disputed, such statement may only be admitted in accordance with this section.

¹ The relevant portion of Federal Rule of Criminal Procedure 16 is nearly identical to R.M.C. 701(c)(1). It states: “Upon a defendant’s request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government’s possession, custody, or control and: (i) the item is material to preparing the defense.” Fed. R. Crim. Proc. 16(a)(1)(E)(i).

(1) As to statements obtained before December 30, 2005, the military judge may admit the statement only if the military judge finds that (A) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and (B) the interests of justice would best be served by admission of the statement into evidence.

(2) As to statements obtained on or after December 30, 2005, the military judge may admit the statement only if the military judge finds that (A) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; (B) the interests of justice would best be served by admission of the statement into evidence; and (C) the interrogation methods used to obtain the statement do not amount to cruel, inhuman, or degrading treatment.

M.C.R.E. 304(c).

(iv) The requested records are material for several reasons. First, they are clearly material to whether or not Mr. Khadr's statements are admissible under the evidentiary rules. The requested discovery therefore is critical to the defense's ability to move for suppression of statements under M.C.R.E. 304(a)(1) or 304(c) on either the basis of torture or coercion resulting in unreliable statements. Indeed, the Discussion accompanying M.C.R.E. 304(c) explicitly provides that information such as that requested by the defense is material: "In evaluating whether [a statement made before December 30, 2005] is reliable and whether the admission of the statement is consistent with the interests of justice, the military judge may consider *all relevant circumstances, including the facts and circumstances surrounding the alleged coercion, as well as whether other evidence tends to corroborate or bring into question the reliability of the proffered statement.*" (Emphasis added).

(v) Second, they are material for the purpose of developing additional corroborating evidence regarding Mr. Khadr's claims of [REDACTED]

²

(vi) Third, any mistreatment Mr. Khadr may have suffered in the hands of prison guards or interrogators in the early days of his incarceration is also relevant to the determination whether coercion existed in later interrogations; Mr. Khadr would have no reason to doubt, during any interrogation, that the interrogators could again engage in physical abuse. *See Arizona v. Fulminante*, 499 U.S. 279, 287 (1991) (recognizing confession can be involuntary as a result of psychological, as well as physical, coercion); *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960) ("[C]oercion can be mental as well as physical, and . . . the blood of the accused is not the

² See generally Khadr Affidavit, 22 Feb 08 (Attachment H to Sgt C Mot.) (The government has not yet determined whether any portions of Mr. Khadr's affidavit are classified. Therefore, the defense has been instructed to redact all portions that could potentially be classified. The redacted copy is attached. An unredacted copy will be delivered to the Commission in Guantanamo Bay.)

only hallmark of an unconstitutional inquisition.”); *Columbe v. Connecticut*, 367 U.S. 568, 605-06 (1961) (“There is torture of mind as well as body; the will is as much affected by fear as by force. And there comes a point where this Court should not be ignorant as judges of what we know as men.”) (quoting *Watts v. Indiana*, 338 U.S. 49, 52 (1949)).

(vii) Mr. Khadr’s knowledge of the mistreatment of other detainees by guards and interrogators gives rise to a coercive environment and affects the reliability of his statements. See *Fulminante*, 499 U.S. at 287; *Blackburn*, 361 U.S. at 206; *Columbe*, 367 U.S. at 605-06 (quoting *Watts*, 338 U.S. at 52). The requested documents will likely corroborate Mr. Khadr’s claims that he knew other detainees were mistreated and that this made him afraid of the interrogators.³

(viii) One pervasive fact increasing the relevance of the requested discovery is the fact that Mr. Khadr was a minor at the time of his arrest (it is uncontested that he was 15 years old at the time); this increases the likelihood that mistreatment by interrogators and guards resulted in unreliable statements. See *Colorado v. Connolly*, 479 U.S. 157, 164 (1986) (the mental condition of the defendant is a factor in determining whether the defendant’s statement was coerced); *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982) (“[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.”); cf. *Schneckloth v. Bustamante*, 412 U.S. 218, 226 (1973) (applying a ‘totality of the circumstances’ test to determining voluntariness of a confession).

(ix) Another pervasive fact lowering the threshold for the type of treatment that may result in coercive or tortured statements is Mr. Khadr’s medical condition at the time of his interrogations. Early in the firefight on 27 July 2002, Mr. Khadr suffered injuries to his eyes and other parts of his body. Khadr Affidavit, ¶¶ 3, 25. Shrapnel was embedded in his eyes. *Id.* And he was shot in the back at two or three times during the firefight, resulting in two cavernous exit wounds in his upper left chest large enough to see deep into his chest cavity. See Photo of Mr. Khadr 00766-000977 (Attachment I to Sgt C Mot.); Undated Document Titled IIR-6-034-0258-03, 00766-000194 (Khadr “was shot 3 times”) (Attachment J to Sgt C. Mot.). One soldier who participated in the firefight saw Mr. Khadr laying on the ground wounded and wrote in his journal that “[Khadr’s] missing a piece of his chest and I can see his heart beating.” Journal at 00766-001380 (Attachment K to Sgt C Mot.). Mr. Khadr’s chest wounds were infected, swollen, and still seeping blood nearly seven months after the firefight, and Mr. Khadr was in the hospital receiving treatment for the gunshot wounds ten months after the firefight.⁴ The defense is unaware of how many surgeries Mr. Khadr endured or how long his injuries remained painful.⁵

³ In Bagram, I would always hear people screaming, both day and night. Sometimes it would be the interrogators [REDACTED], and sometimes it was the prisoners screaming from their treatment. I know a lot of other detainees who were [REDACTED] by the skinny blonde guy. Most people would not talk about what had been done to them. This made me afraid. Khadr Affidavit, ¶ 29.

⁴ See Report of Investigative Activity of 3 June 03 at 1, 00766-000154 (Khadr was interrogated during a June 2003 hospitalization due to infections to his gunshot wounds and hospitalization

(x) There is no question that the requested records meet the minimal standard of being “helpful to the defense of [the] accused” and negate the government’s case against Mr. Khadr. Indeed, they are key to the defense’s ability to test the government’s case and to the factfinders’ ability to weigh the evidence. Mr. Khadr is entitled to the requested discovery not only as a matter of fundamental fairness, but also to ensure that the instant proceedings elicit the truth and provide a fair trial worthy of confidence. *Cf. Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (defining fair trial “as a trial resulting in a verdict worthy of confidence”); *Strickler v. Greene*, 527 U.S. 263, 290 (1999) (same). The public record is replete with numerous alleged or charged cases of detainee mistreatment and torture at Bagram Airbase.⁶ (See, e.g., Attachment B to Sgt C Mot.) These publicly available documents demonstrate that there was a regular pattern and practice, if not an official policy, of mistreatment of detainees. Mr. Khadr’s discovery requests are designed to obtain more detailed evidence of such a policy and practice and to identify corroborating witnesses for the defense. However, the publicly available records are merely a small subset of the information in the prosecution’s control that would assist the defense in developing evidence to corroborate that Mr. Khadr’s alleged statements were extracted under duress. By asking for records relating to other cases of detainee abuse at Bagram, Mr. Khadr is likely to obtain the names of potential witnesses who would corroborate his testimony that his statements were obtained by coercion by testifying that they were subjected to similar coercive techniques at about the same time at Bagram. Such corroborating evidence is clearly material to the preparation of the defense and also tends to negate the government’s evidence of Mr. Khadr’s guilt. The alleged inculpatory statements made by Mr. Khadr are a key part of the government’s case-in-chief. Obviously, evidence corroborating that Mr. Khadr made that statement under duress tends to undercut the reliability of that statement. The requested records therefore are key to the defense’s ability to test the government’s case and to the factfinder’s ability to weigh the evidence.

(xi) United States case law further confirms the materiality of the records requested by Mr. Khadr. In *United States v. Karake*, Rwandan defendants in a federal criminal case moved to suppress inculpatory statements they had made to Rwandan and United States officials on the

was expected to last six more weeks) (Attachment L to Sgt C. Mot); Report of Investigative Activity of 12 Mar 2003 at 1, 00766-000151 (Attachment M to Sgt C Mot.) (Khadr was scheduled to have surgery on his chest wounds on 13 Mar 2003); Report of Investigative Activity of 20 Feb 03 at 1, 00766-000146 (Attachment N to Sgt C Mot.) (Khadr’s wounds swelled to the point of bursting); Report of Investigative Activity of 17 Feb 03 at 2, 00766-000145 (Attachment O to Sgt C Mot.) (blood was seeping from Khadr’s wounds); Report of Investigative Activity of 6 Jan 2003 at 2, Bates No. 00766-000140 (Attachment P to Sgt C Mot.) (Khadr complained to interrogators of pain from his chest and shoulder injuries).

⁵ The prosecution has represented to the defense that it is in the process of obtaining and producing Mr. Khadr’s medical records.

⁶ A search in the LEXIS data base using the terms “Bagram,” “detainee,” and “abuse” on 4 March 2008 produced 2106 results.

ground that their statements were “the product of physical and psychological coercion, resulting from both their conditions of confinement and their treatment while in Rwandan custody.” 443 F. Supp. 2d 8, 12 (D.D.C. 2006). During an evidentiary hearing on the defendants’ motion to suppress, third-party witnesses who had been held at the same Rwandan detention facility as the defendants testified that they had been mistreated and subjected to coercive interrogations at the facility. *See id.* at 12-13, 69-70. The defense offered the third-party witnesses’ testimony in order to corroborate defendants’ claims that “systematic and repeated physical abuse” caused them to make the inculpatory statements. *Id.* at 59, 69. The court found “the corroboration of defendants’ testimony” to be “compelling,” observing that “[t]wo other witnesses testified about their personal experiences while at Kami [the detention center] in years prior to defendants’ detention; former high-ranking officials . . . [who held office] during the relevant time period provided information regarding the abuses at Kami; and State Department reports and other reports to U.S. government officials documented rampant human rights violations, including specific reports of torture at Kami.” *Id.* at 61. In addition, the court found “unpersuasive” the government’s argument that the court should “disregard . . . as out of time” the testimony of the two witnesses who had been tortured at Kami, noting that the same Rwandan authorities had controlled the prison during the times that the defendants and the third-party witnesses were incarcerated there. *Id.* at 71-72. The Court also considered other evidence corroborating the defendants’ claims of coercion, including U.S. government reports on “numerous serious” human rights abuses by the Rwandan government, including abuses at the detention center where the defendants had been held. The court determined that such corroborating evidence created an inference that the practices and conditions that the two witnesses experienced endured throughout the period in which the defendants were held at the facility. *Id.* at 71. Finally, the court credited “[f]urther evidence of continuing abuse and torture,” provided by two former Rwandan government ministers “who learned about the serious problems at Kami” over the relevant time period. *Id.* at 71-72. Such corroborating evidence led the Court to grant defendants’ motions to suppress coerced inculpatory statements made by defendants to investigators. As in the *Karake* case, the requested discovery would corroborate Mr. Khadr’s position that his alleged inculpatory statements should be suppressed because they were obtained by government coercion.

(xii) Finally, even if Mr. Khadr’s alleged inculpatory statements are not suppressed in this case, disclosure of the requested information will still be critical to the preparation of the defense case. The alleged inculpatory statements made by Mr. Khadr are a key part of the government’s case-in-chief, particularly given that there are no eyewitnesses who saw Mr. Khadr throw the grenade that allegedly killed Sgt Speer. Obviously, evidence corroborating that Mr. Khadr made inculpatory statements under duress tends to undercut the reliability of those statements. If his statements are admitted into evidence, it is essential that Mr. Khadr be able to develop and introduce evidence at trial to demonstrate to the factfinder that they are not reliable. *Cf. United States v. Graves*, 23 U.S.C.M.A. 434, 436 (C.M.A. 1975) (“[I]f the matter [voluntariness of a confession] is placed in issue before the jury, the Government must present evidence sufficient to establish, beyond a reasonable doubt, that the inculpatory statement was voluntary. Once the issue is raised, the military judge has a *sua sponte* duty to instruct the court members to reject the accused’s confession in toto if they are not satisfied, beyond a reasonable doubt, of the voluntariness of the statement.”). Such evidence may be developed by the defense during cross-examination or introduced during the defense case. And the documents Mr. Khadr seeks could help in uncovering evidence for use at trial. If the defense is not permitted to

develop and introduce such evidence, the factfinder may place unwarranted weight on a putative “confession” that was obtained by coercion – perhaps even torture. If the defense is not permitted access to that evidence of coercion, it will be crippled in its ability to develop its case. And moreover, the factfinder will make decisions based on incomplete and one-sided information.

(2) The Due Process Clause & MCA § 949j(d)(2) Require Disclosure

(i) The disclosure requirement under the R.M.C. 701(c) echoes a fundamental principle of U.S. law: The government’s failure to disclose “evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment” *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The government’s duty to disclose such evidence encompasses exculpatory evidence, including impeachment evidence. *United States v. Bagley*, 473 U.S. 667, 675 (1985) (impeachment evidence falls within *Brady* rule); *United States v. Mahoney*, 58 M.J. 346, 349 (C.A.A.F. 2003) (characterizing impeachment evidence as exculpatory evidence). Such evidence is “material” “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Id.* at 682. “The message of *Brady* and its progeny is that a trial is not a mere ‘sporting event’; it is a quest for truth in which the prosecutor, by virtue of his office, must seek truth even as he seeks victory.” *Monroe v. Blackburn*, 476 U.S. 1145, 1148 (1986); *see also Bagley*, 473 U.S. at 675 (“The *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur.”).

(ii) The MCA makes *Brady*, at least with respect to exculpatory evidence, applicable to military commissions. *See* 10 U.S.C. § 949j(d)(2). Section 949j(d)(2) of the MCA states that the prosecution must disclose exculpatory evidence that it “would be required to disclose in a trial by general court-martial.” *Brady* governs disclosure of exculpatory evidence in general courts-martial. *Mahoney*, 58 M.J. at 349. Therefore, by virtue of MCA § 949j(d)(2), *Brady* applies to military commissions.⁷

⁷ The requested documents are also relevant to assess whether Mr. Khadr’s statements violate his due process right not to be convicted on the basis of involuntary statements. *But see Boumediene v. Bush*, 476 F.3d 981 (2007), *cert. granted* 127 S. Ct. 3078 (2007). The use of coerced confessions – whether deemed otherwise reliable or not – as evidence to convict an accused violates due process. *See Lynum v. Illinois*, 372 U.S. 528, 534, 83 S.Ct. 917 (1963) (due process violated where coerced confession used at trial). “The ultimate test [with respect to the admissibility of confessions] remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker?” *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961). A court looks at the totality of the circumstances, including “the characteristics of the accused and the details of the interrogation,” to determine whether the statement is voluntary. *Schneckloth v. Bustamante*, 412 U.S. 218, 226, 93 S.Ct. 2041 (1973) (establishing ‘totality of the circumstances’ test to determine voluntariness of a confession). The totality of circumstances encompasses psychological, as well as physical coercion as well-settled Supreme Court cases “have made clear that a finding of coercion need not depend upon actual violence by a government agent; a credible threat is sufficient.” *Arizona v. Fulminante*, 499 U.S.

(iii) The government intends to rely upon Mr. Khadr's allegedly inculpatory statements as evidence of his guilt. Because the requested records will likely corroborate the defense claim that Mr. Khadr's statements were obtained by coercion, they are likely "exculpatory" in nature, and there is a "reasonable probability" that the disclosure of this evidence will yield a different result in the instant proceedings. *Bagley*, 473 U.S. at 676, 682 ("A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."). If the defense is denied access to that information, then counsel will be hamstrung in its ability to investigate and prepare the defense case. As a result, Mr. Khadr could be convicted on the basis of a putative "confession" that is nothing more than a fabrication extracted under duress. This risk is of particular concern here, where there are no eye witnesses to the alleged facts forming the basis for the murder charge. Such an outcome would obviously prejudice Mr. Khadr's most fundamental rights, but would also pervert the cause of justice and fair process. *Brady* and its progeny – made applicable to military commissions by MCA § 949j(d)(2) – therefore require disclosure of the requested records, independent of R.M.C. 701(c)(1)'s broader discovery provision.

(3) International Law Requires Disclosure

(i) The Military Commissions Act (M.C.A.) and the Manual for Military Commissions (M.M.C.) incorporate the judicial safeguards of Common Article 3 of the Geneva Conventions. *See* 10 U.S.C. § 948(b)(f) ("A military commission established under this chapter is a regularly constituted court, affording all the necessary 'judicial guarantees which are recognized as indispensable by civilized peoples' for purposes of Common Article 3 of the Geneva Conventions.")⁸; R.M.C., Preamble (stating that the Manual for Military Commissions "provides procedural and evidentiary rules that [. . .] extend to the accused all the 'necessary judicial guarantees' as required by Common Article 3.") They must, therefore, be read in light of Common Article 3 and international law surrounding that provision.

279, 287, (1991); *see also Columbe v. Connecticut*, 367 U.S. 568, 605-06 (1961) (quoting *Watts v. Indiana* 338 U.S. 49, 52 (1949)); *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960). To conform to seminal constitutional principles, therefore, any statements used against an accused must be the product of free will. *See Culombe*, 367 U.S. at 602.

⁸ Whether military commissions, in fact, comply with Common Article 3 is ultimately a judicial question that Congress does not have the power to answer. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the *judicial department* to say what the law is.") (emphasis added). Any congressional attempt to legislative an answer to such a judicial question violates the bedrock separation of powers principle and has no legal effect. *See id.* at 176-77 ("The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written."). Because a statute should be construed to avoid constitutional problems unless doing so would be "plainly contrary" to the intent of the legislature, *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *see also Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936), the only reasonable interpretation is that § 948b(f) is that it requires military commissions to comply with Common Article 3.

(ii) The Geneva Convention Relative to the Treatment of Prisoners of War prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” *See* Geneva Convention, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, Common Article 3. The judicial safeguards required by Common Article 3 are delineated in article 75 of Protocol I to the Geneva Conventions of 1949.⁹ Article 75(a) provides that the procedures for trial “shall afford the accused before and during his trial all necessary rights and means of defense.”¹⁰

(iii) Read in light of international law principles, precedents applying the U.S. Constitution, the rules governing this Commission, and the Government’s denial of the Defense request for documents relating to the investigation and prosecution of allegations of abuse and mistreatment of detainees at Bagram ignores fundamental concepts of fairness and places in question the integrity of these proceedings.

b. Denial of the Requested Documents Will Necessarily Result in Counsel Failing to Provide Competent Representation

(1) Failure to grant the defense access to the requested documents will deprive Mr. Khadr of competent representation by precluding the defense from inquiring into possible challenges to the voluntariness of his statements and possibly the ability to impeach government witnesses. *Cf. Smith v. Wainright*, 777 F.2d 609, 617 (5th Cir 1985) (discussing defense counsel failure to move for suppression of confession in assessing ineffective assistance of counsel claim). Governing military ethics rules require Mr. Khadr’s military counsel to provide “competent” representation. “Competent representation requires . . . access to evidence.” JAGINST 5803.1C (9 Nov 04). “[I]nvestigation is an essential component of the adversary

⁹ *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 75, 1125 U.N.T.S. 3, *entered into force* Dec. 7, 1978 [hereinafter Additional Protocol]. The Protocol has not been ratified by the United States, but the U.S. government has acknowledged that Article 75 is customary international law. *See Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2797 (2006) (stating that the government “regard[s] the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled”). *See also* Memorandum from W. Hays Parks, Chief, International Law Branch, DAJA-IA, et. al., to Mr. John H. McNeill, Assistant General Counsel (International), OSD (8 May 1986) (stating art. 75 of Additional Protocol I is customary international law). The Supreme Court has also relied on the Additional Protocol in construing the meaning of Common Article 3 of the Geneva Conventions as applied to military commissions. *See Hamdan*, 126 S.Ct. at 2796.

¹⁰ The ICTY and the ICTR similarly provide “minimum guarantees” for the accused to “be entitled to a fair and . . . hearing.” Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, art. 21(2), U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), *adopted by* Security Council 25 May 1993, U.N. Doc. S/RES/827 (1993); Statute of the International Tribunal for Rwanda, art. 20(2), *adopted by* S.C. Res. 955, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598, 1600 (1994).

process.” *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987) (quoting *Wade v. Armontrout*, 798 F.2d 304, 307 (8th Cir. 1986)). Thus, the adversarial process will not function properly if the defense counsel fails to investigate his client’s case or is denied access to evidence within the control of the government that is relevant to the investigation. *See id.* Here, the government’s view of what evidence is relevant and material to the preparation of the defense is so narrow as to necessarily cause defense counsel to fail to provide competent representation to Mr. Khadr. Accordingly, this Commission should order the government to produce the requested documents.

c. Conclusion

(1) The Supreme court has said “that the United States Attorney is ‘the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.’” *Strickler*, 537 U.S. at 281 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). When the prosecution reserves to itself the determination of what evidence ought be considered, it disregards its duty to seek justice, and usurps the role of the court, defense counsel and the trier of fact. *Cf. Brady*, 373 U.S. at 87-88, n.2. The integrity of these proceedings will be fatally undermined if the defense is not afforded the opportunity to independently investigate the factual allegations at issue in the case. At a minimum, this requires that the defense be given documents relating to the investigation and prosecution of allegations of detainee abuse and mistreatment at Bagram.

7. Oral Argument: The Defense requests oral argument as it is entitled to pursuant to R.M.C. 905(h), which provides that “Upon request, either party is entitled to an R.M.C. 803 session to present oral argument or have evidentiary hearing concerning the disposition of written motions.” Oral argument will allow for thorough consideration of the issues raised by this motion.

8. Witnesses & Evidence: The Defense does not anticipate the need to call witnesses in connection with this motion, but reserves the right to do so should the Prosecution’s response raise issues requiring rebuttal testimony. The defense relies on the following as evidence:

Defense Discovery Request of 9 November 07 (Attachment D to D-025 Defense Motion to Compel Discovery (Eyewitnesses))

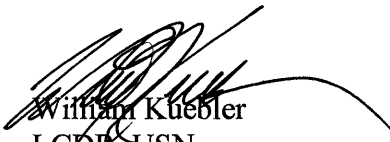
Government Response of 4 December 07 to Defense Discovery Request of 9 November 2007 (Attachment E to D-025, Defense Motion to Compel Discovery (Eyewitnesses))

Sgt C Mot. and attachments submitted in support thereof

9. Conference: The Defense has conferred with the Prosecution regarding the requested relief. The Prosecution objects to the requested relief.

10. Additional Information: In making this motion, or any other motion, Mr. Khadr does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this Military Commission to charge him, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in and all appropriate forms.

11. **Attachments:** None.



William Kuebler
LCDR, USN
Detailed Defense Counsel

Rebecca S. Snyder
Assistant Detailed Defense Counsel

[REDACTED]

From: Groharing, Jeff, Maj, DoD OGC
Sent: Monday, March 10, 2008 6:33 PM
To: [REDACTED]
[REDACTED]

Subject: RE: Filing Designation: D-034 Notice of Motion to Compel Discovery (Investigation & Prosecution of Detainee Abuse) - US v. Khadr
Signed By: [REDACTED]

Sir,

The government intends to comply with the defense request.

By doing so, the government in no way concedes to the relevance or admissibility of any of the documents in question at trial.

V/R,

Jeff Groharing
Major, U.S. Marine Corps

[REDACTED]

From: [REDACTED]
Sent: [REDACTED]

[REDACTED]

ignation: D-034 Notice of Motion to Compel Discovery (Investigation & Prosecution of Detainee Abuse) - US v. Khadr

All parties,

The filing designation for the 4 MAR 08 Defense Notice of Motion to Compel Discovery (Investigation & Prosecution of Detainee Abuse) AND any related Motions, Responses, or Replies that may follow is D-034 Notice of Motion to Compel Discovery (Investigation &

Prosecution of Detainee Abuse) - Khadr. A Notice of Motion does not initiate or trigger the response or reply times contained in the RC.

All future communications - whether in hard copy or by email - concerning this motion will use the filing designation as a reference in addition to the name of the filing. See RC 5.3:

3. Filing designation and future communications or filings.

a. Once a filing designation has been assigned, all future communications - whether in hard copy or by email - concerning that series of filings will use the filing designation as a reference in addition to the name of the filing. This includes adding the initial file designations to the style of all filings, the subject lines of emails, and the file names to ALL email attachments. Examples:

* An email subject line forwarding a response to P2 in US v Jones should read: "P2 Jones - Defense Response - Motion to Exclude Statements of Mr. Smith." The filename of the filings shall be the same as the response being sent.

* The filename of a document that is an attachment to the response should read: "P2 Jones - Defense Response - Motion to Exclude Statements of Mr. Smith - attachment - CV of Dr Smith."

v/r,

[REDACTED]

[REDACTED]

From: [REDACTED]
Sent: [REDACTED]

[REDACTED]

Prosecution Detainee Abuse)

[REDACTED]

I am sending this attachment on behalf of Ms. Snyder and LCDR Kuebler for US v. Khadr. Please find attached the Defense Notice of Motion to Compel Discovery (Investigation & Prosecution Detainee Abuse).

REBEKAH S. STUYVESANT
SSG, US Army

[REDACTED] sel Office of Military Commissions-Defense

[REDACTED] as attorney work product and/or attorney-client communication or may be protected by another privilege recognized under the law. Do not distribute, forward, or release without the prior approval of the sender or DoD OGC Office of Military Commissions, Office of Chief Defense Counsel. In addition, this communication may contain individually identifiable information the disclosure of which, to any person or agency not entitled to receive it, is or may be prohibited by the Privacy Act, 5 U.S.C. §552a. Improper disclosure of protected information could result in civil action or criminal prosecution

12 April 2008

Subject: Summary - RMC 802 Conference - 10 April 2008

The following is a summary of an RMC 802 conference held at 1000 hours, 10 April 2008, at Guantanamo Bay, Cuba.

1. The following were present:

- a. The Military Judge, COL Peter Brownback
- b. Government Counsel, Maj Jeff Groharing, CPT Keith Petty, Mr. John Murphy, SSG Guadalupe Ona
- c. Defense Counsel, LCDR Bill Kuebler, Ms. Rebecca Snyder, SSG Rebekah Stuyvesant

2. The parties discussed the status of each of the outstanding discovery issues raised and/or litigated at the hearing on 13 March 2008, supplemental defense discovery requests, as well as the motions and notice of motions filed by the defense since the last hearing.

3. Regarding D025, MTC (eyewitnesses), the prosecution has provided the defense a partial list of soldiers present in the vicinity of the firefight resulting in the accused's capture. The prosecution has requested additional information from each unit present at the firefight and will provide any updates we receive.

4. Regarding D050, Notice of Motion (Reports from other Special Operations Units), and D032 (Motion to Compel Documents re Capture & Detention), which subsumes D050, the government stated it has been able to locate a few additional documents related to the firefight and will provide them after appropriate redactions are made. The government has requested all units present to review their files as well as CENTCOM. Several units have advised the government that they do not have any responsive documents. The Government expects a comprehensive response from CENTCOM in the near future. The government stated that military units were not required to conduct death investigations for combat deaths until post-Tillman. The military judge suggested the government contact the "HRC" or like organization to attempt to find a "casualty report" related to SFC Chris Speer's death. Resolution of this discovery issue is still pending.

5. Regarding D026, MTC (documents relating to Charge III), at the March hearing the military judge directed the prosecution to determine whether it could obtain the requested documents. The prosecution has obtained them and does not intend to produce them because they are accurately summarized in the 9/11 Report. The government also contends they are not relevant because whether the alleged co-conspirator disagreed with the tactics of al Qaeda is irrelevant to whether there was an al Qaeda conspiracy. The defense explained that evidence that the individuals with whom Mr. Khadr is alleged to have conspired did not agree that particular attacks should be carried out is relevant. Resolution of this discovery issue is still pending. In response to the military judge's question regarding what the government can prove up in light of the dismissal of language from the conspiracy charge due to the Commission's ruling on D019, the prosecution responded that they intended to show an al Qaeda conspiracy was formed to accomplish certain objectives, that the organization is a conspiracy, that the

accused joined the conspiracy that was already existing in order to do the types of things al Qaeda had previously done. The prosecution explained that their proof would include evidence regarding the 9/11 attacks, the USS COLE Bombing, the embassy attacks, etc., and that this evidence goes to the accused's knowledge of what he joined. In response to the military judge questioning what the 9/11 attacks have to do with the accused since he is alleged to have joined the conspiracy in June 2002, the prosecution explained that it shows that the accused knew what kinds of things al Qaeda did when he joined the conspiracy. The defense stated that the government's proffer suggests that it still intends to prove liability based on a criminal enterprise theory; but the government must show a specific agreement to commit certain object offenses, which makes the documents even more relevant after the military judge's ruling on D019. The defense explained that it has established more than a baseline of materiality regarding the documents. Resolution of this discovery issue is still pending.

6. Regarding D027, MTC (Sgt C Docs), and D034 MTC (Bagram Abuse Investigation), the government produced 5132 pages to the defense on 3 April, which are all but a few subparts of the investigation. The defense will review the documents and notify the commission if there are any additional issues relating to these motions.

7. Regarding D029, MTC (Khadr's Statements), the government has produced three unclassified summaries approved by the Military Judge following an MCRE 505 hearing. The government intends to produce four more documents. There will be a summary produced in lieu of classified information for another one of those documents after an MCRE 505 hearing, which will have to be held sometime after this week. Resolution of this discovery issue is still pending.

8. Regarding D030, MTC (Docs re Davis Investigation), the government filed a motion to reconsider which will be addressed on the record tomorrow.

9. Regarding D031, Notice of Motion (Physical Evidence), the prosecution has learned that the original video found at the compound is located in an evidence locker at JTF. The prosecution was also advised that an English Bible that was purportedly found at the scene of the firefight is also located in the evidence locker. The prosecution will make this evidence available to the defense. Resolution of this discovery issue is still pending.

10. Regarding D033, Notice of Motion (US-Canadian Correspondence), State department has found some relevant documents, which the prosecution will look at next week. Resolution of this discovery issue is still pending. The defense counsel noted that the Canadian Government representative present for the hearing stated that Canada has documents relevant to the case and wants to know what level of protection the documents should receive if released to defense counsel pursuant to the Canadian litigation in Mr. Khadr's case. Resolution of this discovery issue is still pending.

11. Regarding D035, Notice of Motion (Interrogators ID), the government intends to file a motion to reconsider.

12. Regarding D036, MTC (Manuals & SOPs), the government has numerous manuals and SOPs (approximately 675 pages) in effect during the time periods that the accused was interrogated. The government will continue to gather all manuals and SOPs that would have been in effect during interrogations of the accused.

13. Regarding D048, Notice of Motion (SERE SOP), the government said that it did not intend to produce this document because it was never adopted as policy, so it is not relevant. There is also an additional interrogation manual the government has reviewed and does not intend to produce. Resolution of this discovery issue is still pending.

14. Regarding D037, Notice of Motion (Videos, Audio, Photos), the government can only find one video, which is the video of the Canadian interrogation. It is in the process of making a copy of this video for the defense. The government did not locate any photos or videos taken in connection with changing the accused's bandages in Bagram or during medical exams. Resolution of this discovery issue is still pending.

15. Regarding D038, Notice of Motion (Classified Report), the government has produced an unclassified summary to the defense.

16. Regarding D041, MTC (██████ Documents), the prosecution has an MCRE 505 filing for the military judge today that relates to this motion. It is a declaration that says the documents the defense seeks do not contain derogatory information. The defense explained that it also requested information relating to ██████'s training and experience. The government stated that ██████ has agreed to speak to the defense and that he would answer some questions about this, but may be limited in what he can say. The defense explained that because ██████ had an incentive to describe his training and experience in such a way as to make his conclusions regarding who threw the grenade credible, it was important to be able to independently verify ██████'s claims regarding his training and experience. The military judge stated the defense could raise this issue after talking to ██████.

17. Regarding D042, MTC (Intelligence Reports re Compound), the prosecution stated the defense has all the written intelligence reports that they have been able to locate after making requests of all appropriate USG agencies. It intends to produce an unclassified summary of classified information regarding the intelligence that led U.S. forces to the compound where the accused was captured after a protective order is entered regarding this document. Resolution of this discovery issue is still pending.

18. Regarding D043, MTC (DIMS), the prosecution is in the process of gathering the information. Resolution of this discovery issue is still pending.

19. Regarding D044, MTC (Various Individuals), the defense filed the motion on 7 April 2008, so the government is not yet prepared to respond. The government will respond in writing. Resolution of this discovery issue is still pending.

20. Regarding D045, Notice of Motion (al Qaeda membership lists), the defense filed it on 7 April 2008, so the government is not yet prepared

to respond. The government will respond in writing. Resolution of this discovery issue is still pending.

21. Regarding D046, Notice of Motion (Identity of Co-conspirators), the defense filed it on 7 April 2008, so the government is not yet prepared to respond. The government will respond in writing. Resolution of this discovery issue is still pending.

22. Regarding D047, Special Request for Relief to Strike Additional Language from Charge III based on the ruling for D019 and filed on 9 April 2008, the government will respond in writing. Resolution of this discovery issue is still pending.

23. Regarding D049, MTC (LIFG), the government stated that the request was overbroad, the defense had not described how the requested documents would material to the preparation of the defense and that it would respond in writing. Resolution of this discovery issue is still pending.

24. Regarding D051, Notice of Motion (Recruitment of Child Soldiers), the defense filed it on 9 April 2008, so the government is not yet prepared to respond. The government will respond in writing. Resolution of this discovery issue is still pending.

25. Regarding D052, Notice of Motion (SOPs re Minors), the government stated that it is expending tremendous resources looking for documents. The defense explained that if the government has detained and treated the accused in a manner that does not comply with applicable SOPs, that fact is admissible as mitigating evidence for sentencing. The military judge stated that he would give the prosecution an opportunity to respond in writing.

26. Regarding D053, Notice of Motion (Investigator Notes), the prosecution stated that there is no reason to produce the notes since they are incorporated in the Form 40s. The military judge stated that the prosecution could respond in writing.

27. The defense inquired as to whether the Notices of Motion would become part of the record and made publicly available. The military judge said that they would be. The military judge invited the defense to let him know for which motions or notices of motions the parties had completed the filings that had not yet been released.

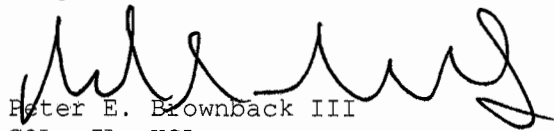
28. The defense asked if the temperature in the courtroom could be raised because counsel and the client were extremely cold during the last hearing. The military judge asked Capt Petty to handle the issue.

29. The defense noted that after the last hearing, discovery materials were taken from the client's box where his commissions legal materials are kept. When he asked for the documents, he was brought an empty box. The defense explained that the detainees are allowed to have access to habeas legal materials without transport, but to see commissions legal materials they must be transported and shackled. The prosecution explained that they had been told about a stamping policy whereby legal materials could be marked as such, but that stamping legal materials was not required. The defense also explained that the JTF intended to implement a policy that all notes taken during client

meetings are classified, but that there was no mechanism to "declassify" the notes. The military judge asked Capt Petty to obtain a copy of the stamping policy, the classification of notes policy, and the policy as to what documents can be reviewed where. Captain Petty asked the defense to approach him regarding any problems they are having related to meeting with their client or preparing a defense.

30. The defense stated that it intended to file another discovery motion in which it would seek documents relating to the principle of *tu quoque*.

31. This summary was agreed to by defense counsel (on 11 April) and government counsel (on 12 April) before it was signed by the military judge.



Peter E. Brownback III
COL, JA, USA
Military Judge

CF: All attendees.

Khadr - Motions Status Summary a/o 9 May 2008
V2 after RMC 802 Conference at 0830

Includes information from Filings Inventory, RMC 802 Conferences, and Transcripts

P-001 Complete
P-002 Complete
P-003 Pending – a) CA action on witness request, b) MJ ruling on MJ-012
P-004 Complete
P-005 Complete
P-006 Complete

D-001 Complete
D-002 Complete
D-003 Complete
D-004 Complete
D-005 Complete
D-006 Complete
D-007 Complete
D-008 Complete
D-009 Complete
D-010 Complete
D-011 Complete
D-012 Complete
D-013 Complete
D-014 Complete
D-015 Complete
D-016 Complete
D-017 Complete
D-018 Complete
D-019 Complete
D-020 Complete
D-021 Complete
D-022 Complete
D-023 Complete
D-024 Complete

D-025 Action complete. If DC want more, they will make a new request. MJ will file a determination in the matter.

D-026 Complete

D-027 Action complete. If DC want more, they will make a new request. MJ will file a determination in the matter.

D-028 Complete

D-029 TC waiting for final confirmation from CENTCOM that no subordinate units/agencies have any other notes. Once received, TC will advise DC.

D-030 Complete

D-031 Action complete. If DC want more, they will make a new request. MJ will file a determination.

D-032 Government still working on finding post-action reports. Gov't looking for casualty reports. This motion subsumes D-050. ROT 11 Apr 08. **Gov't believes that some report will be declassified next week. ROT 8 May.**

D-033 Government was to review DOS documents week of 15 April. ROT 11 Apr 08. **Mr. Murphy has completed review and should get documents next week. TC will advise DC of what documents it is not providing. TC stated some documents re Khadr's father – DC demanded research on them. TC will search and advise. ROT 8 May 08.**

D-034 This motion is subsumed by D-027. ROT 11 Apr 08. **Action complete. If DC want more they will make a new request. MJ will file a determination in the matter.**

D-035 MJ issued ruling. Government email dated 2 April 2008 said it was going to file motion to reconsider. Still not received. ROT 11 Apr 08. **Government will file a classified request for reconsideration in Gitmo o/a 6 May – TC – 30 Apr. TC filed classified request for reconsideration 6 May, not signed. MJ signed revised order 7 May. Action complete.**

D-036 Government is still searching for Manuals and SOPs. ROT 11 Apr 08. **Parties still discussing OGA manuals. TC/DC talk re submitting written interrogatories thru TC to OGA re certain techniques. ROT 8 May.**

D-037 Government trying (a/o 11 Apr) to make copy of one video for DC. Government did not locate any other videos or photos. ROT 11 Apr 08. **Still tech problems with face changing on tape. Plus TC, at DC request, trying to get video declassified if tech problem solved. ROT 8 May.**

D-038 Government gave unclassified version of report. DC will advise if it wants more. ROT 11 Apr 08. **Action complete. MJ will file a determination in the matter.**

D-039 Complete

D-040 Complete

D-041 No action by MJ until DC reviews in light of Pro Ord #4. ROT 11 Apr 08. **DC still reviewing in light of Pro Ord #4. ROT 8 May.**

D-042 No action by MJ until DC reviews in light of Pro Ord #4. ROT 11 Apr 08. **DC still reviewing in light of Pro Ord #4. ROT 8 May.**

D-043 No response from government. Will one be furnished? ROT 11 Apr 08. DC - 27 Apr 08 indicates that gov't has provided discovery. Problems with means of discovery. TC - 30 Apr - will work w/DC w/in constraints of maintaining control of documents. **Problem mutated. MJ issued oral ruling, will issue final ruling in writing. Ruling include furnishing DIMS Binder 2 by 22 May 1700 hours. TC will discuss with JTF need to cooperate w/information requests or face lengthy delay in trial. ROT 8 May.**

D-044 Response filed. a) Does DC want to reply? No - DC 29 Apr. b) Does either side want further oral argument? Yes - DC 30 Apr. **Both sides argued this motion w/D-049. MJ will issue ruling. ROT 8 May.**

D-045 Response filed. a) Does DC want to reply? No - DC 29 Apr. b) Does either side want further oral argument? Yes - DC 30 Apr. **Both sides argued. MJ will issue ruling. ROT 8 May.**

D-046 Response filed. a) Does DC want to reply? No - DC 29 Apr. b) Does either side want further oral argument? Yes - DC 30 Apr. **Both sides argued. MJ will issue ruling. ROT 8 May.**

D-047 Response filed. a) Does DC want to reply? No - DC 29 Apr. b) Does either side want further oral argument? No - DC 29 Apr. **With MJ for decision.**

D-048 Response filed. a) Does DC want to reply? No - DC 29 Apr. b) Does either side want further oral argument? Yes - DC 30 Apr. **Both sides argued. MJ will issue ruling. ROT 8 May.**

D-049 Response filed. a) Does DC want to reply? No - DC 29 Apr. b) Does either side want further oral argument? Yes - DC 30 Apr. **Both sides argued this motion w/D-044. MJ will issue ruling. ROT 8 May.**

D-050 This motion is subsumed by D-032. ROT 11 Apr 08.

D-051 Response filed. a) Does DC want to reply? No - DC 29 Apr. b) Does either side want further oral argument? Yes - DC 30 Apr. **Both sides argued. MJ will issue ruling. ROT 8 May.**

D-052 No response received. Does either side want oral argument? Yes - DC 30 Apr. Government working to find documents - TC 30 Apr. **No argument. TC has found at least two documents. Still searching. ROT 8 May.**

D-053 Response filed. a) Does DC want to reply? No – DC 29 Apr. b) Does either side want further oral argument? Yes – DC 30 Apr. **Both sides argued. MJ will issue ruling. ROT 8 May.**

D-054 Complete.

D-055 Motion filed. Response **received. Both sides argued. MJ will issue ruling. ROT 8 May.**

MJ-001 Complete

MJ-002 Complete

MJ-003 Complete

MJ-004 Complete

MJ-005 Complete

MJ-006 Complete

MJ-007 Complete

MJ-008 Complete

MJ-009 With MJ for decisions on trial schedule. **MJ set certain dates on the record. Will supplement with formal ruling. Both sides argued. ROT 8 May.**

MJ-010 Complete

MJ-011 Complete

MJ-012 Parties have submitted briefs, **responses to briefs, and DC reply to response. MJ declined to hear argument on motion on 8 May.**

**UNITED STATES
OF
AMERICA**

**D-038
Defense Notice of Motion to Compel Production of
Classified Report.**

9 May 2008

v

OMAR AHMED KHADR
a/k/a "Akhbar Farhad"
a/k/a "Akhbar Farnad"
a/k/a "Ahmed Muhammed Khahi"

1. The defense filed this notice of motion on 4 March 2008. The military judge has not at any time required that the defense provide a motion as contemplated by the Rules of Court. In lieu of a response, the government sent an email on 7 March stating that it would provide an unclassified version of the report. At an RMC 802 conference on 10 April and on the record on 11 April, the defense stated that it had received the unclassified version of the report and was reviewing it to see if it met their needs. At an RMC 802 conference on 7 May and on the record on 8 May, the defense said that no further action was required on this item. In the Motion Status Summary, distributed to the parties on 9 May 2008, D-038 carried the notation : "Action complete. MJ will file a determination in the matter." Other than the original notice of motion filed by the defense, no other pleadings concerning this motion were filed by either party.
2. Documents discussed in paragraph 1 will be contained in the Appellate Exhibit which contains this motion.
3. The commission determines that the government has satisfied the requirements of RMC 701 in connection with this motion. Any further requests by the defense in connection with the subject of this motion will be made in the context of a new discovery request.
4. The commission rules that action by the parties and the commission on this motion is now Final.

Peter E. Brownback III
COL, JA, USA
Military Judge

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

**Notice of Defense Motion
To Compel Production of Classified Report**

4 March 2008

1. **Timeliness:** This notice of motion is filed within the timeframe established by the Military Judge's 21 February 2008 e-mail order.

2. **Notice of motion:** On or about 13 March 2008, the defense shall move this Military Commission for an order directing the government to produce the following documents or materials: a report referenced in paragraph 3e of the Defense Discovery Request dated 9 November 2007.

3. **Summary of basis for motion:** The report is a classified document prepared by a U.S. Government agency detailing (as the defense understands it) events surrounding the 27 July 2002 firefight after which the accused was taken into custody by U.S. forces. One document provided in connection with this matter already shows that the report may contain information that is at the very least "helpful" to the defense, and at most, exculpatory. It is therefore material to the preparation of the defense.

4. **Oral Argument:** The Defense requests oral argument as it is entitled to pursuant to R.M.C. 905(h) ("Upon request, either party is entitled to an R.M.C. 803 session to present oral argument or have evidentiary hearing concerning the disposition of written motions."). Oral argument will allow for a thorough consideration of the issues.

5. **Witnesses and evidence:** The defense does not anticipate the need to call witnesses in connection with this motion, but reserves the right to do so should the prosecution's response raise issues requiring rebuttal testimony. The defense relies on the following as evidence:

Attachment A (classified document)

Defense Discovery Request of 9 November 07 (Attachment D to D-025 Defense Motion to Compel Discovery (Eyewitnesses))

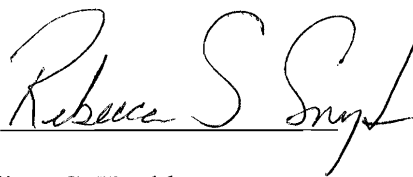
Government Response of 4 December 07 to Defense Discovery Request of 9 November 2007 (Attachment E to D-025, Defense Motion to Compel Discovery (Eyewitnesses))

6. **Certificate of conference:** The defense and prosecution have conferred. The prosecution objects to the relief requested.

7. Additional Information: In making this motion, or any other motion, Mr. Khadr does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this Military Commission to charge him, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in and all appropriate forms.

8. Attachment:

- A Classified Document to be filed with the Military Commission during the next hearing in Guantanamo Bay

By: 

William C. Kuebler
LCDR, JAGC, USN
Detailed Defense Counsel

Rebecca S. Snyder
Assistant Detailed Defense Counsel

[REDACTED]

From: [REDACTED]

Friday, May 09, 2008 6:48 PM

To: [REDACTED]

Subject:

FW: Filing Designation: D-038 Motion to Compel Production (Classified Report) - US v. Khadr

[REDACTED]

US v. Khadr

Sir,

Although the government does not concede that production of the report in question is required under the M.C.A, we intend to produce an unclassified version of the report to the Defense.

V/R,

Major Groharing

12 April 2008

Subject: Summary - RMC 802 Conference - 10 April 2008

The following is a summary of an RMC 802 conference held at 1000 hours, 10 April 2008, at Guantanamo Bay, Cuba.

1. The following were present:

- a. The Military Judge, COL Peter Brownback
- b. Government Counsel, Maj Jeff Groharing, CPT Keith Petty, Mr. John Murphy, SSG Guadalupe Ona
- c. Defense Counsel, LCDR Bill Kuebler, Ms. Rebecca Snyder, SSG Rebekah Stuyvesant

2. The parties discussed the status of each of the outstanding discovery issues raised and/or litigated at the hearing on 13 March 2008, supplemental defense discovery requests, as well as the motions and notice of motions filed by the defense since the last hearing.

3. Regarding D025, MTC (eyewitnesses), the prosecution has provided the defense a partial list of soldiers present in the vicinity of the firefight resulting in the accused's capture. The prosecution has requested additional information from each unit present at the firefight and will provide any updates we receive.

4. Regarding D050, Notice of Motion (Reports from other Special Operations Units), and D032 (Motion to Compel Documents re Capture & Detention), which subsumes D050, the government stated it has been able to locate a few additional documents related to the firefight and will provide them after appropriate redactions are made. The government has requested all units present to review their files as well as CENTCOM. Several units have advised the government that they do not have any responsive documents. The Government expects a comprehensive response from CENTCOM in the near future. The government stated that military units were not required to conduct death investigations for combat deaths until post-Tillman. The military judge suggested the government contact the "HRC" or like organization to attempt to find a "casualty report" related to SFC Chris Speer's death. Resolution of this discovery issue is still pending.

5. Regarding D026, MTC (documents relating to Charge III), at the March hearing the military judge directed the prosecution to determine whether it could obtain the requested documents. The prosecution has obtained them and does not intend to produce them because they are accurately summarized in the 9/11 Report. The government also contends they are not relevant because whether the alleged co-conspirator disagreed with the tactics of al Qaeda is irrelevant to whether there was an al Qaeda conspiracy. The defense explained that evidence that the individuals with whom Mr. Khadr is alleged to have conspired did not agree that particular attacks should be carried out is relevant. Resolution of this discovery issue is still pending. In response to the military judge's question regarding what the government can prove up in light of the dismissal of language from the conspiracy charge due to the Commission's ruling on D019, the prosecution responded that they intended to show an al Qaeda conspiracy was formed to accomplish certain objectives, that the organization is a conspiracy, that the

accused joined the conspiracy that was already existing in order to do the types of things al Qaeda had previously done. The prosecution explained that their proof would include evidence regarding the 9/11 attacks, the USS COLE Bombing, the embassy attacks, etc., and that this evidence goes to the accused's knowledge of what he joined. In response to the military judge questioning what the 9/11 attacks have to do with the accused since he is alleged to have joined the conspiracy in June 2002, the prosecution explained that it shows that the accused knew what kinds of things al Qaeda did when he joined the conspiracy. The defense stated that the government's proffer suggests that it still intends to prove liability based on a criminal enterprise theory; but the government must show a specific agreement to commit certain object offenses, which makes the documents even more relevant after the military judge's ruling on D019. The defense explained that it has established more than a baseline of materiality regarding the documents. Resolution of this discovery issue is still pending.

6. Regarding D027, MTC (Sgt C Docs), and D034 MTC (Bagram Abuse Investigation), the government produced 5132 pages to the defense on 3 April, which are all but a few subparts of the investigation. The defense will review the documents and notify the commission if there are any additional issues relating to these motions.

7. Regarding D029, MTC (Khadr's Statements), the government has produced three unclassified summaries approved by the Military Judge following an MCRE 505 hearing. The government intends to produce four more documents. There will be a summary produced in lieu of classified information for another one of those documents after an MCRE 505 hearing, which will have to be held sometime after this week. Resolution of this discovery issue is still pending.

8. Regarding D030, MTC (Docs re Davis Investigation), the government filed a motion to reconsider which will be addressed on the record tomorrow.

9. Regarding D031, Notice of Motion (Physical Evidence), the prosecution has learned that the original video found at the compound is located in an evidence locker at JTF. The prosecution was also advised that an English Bible that was purportedly found at the scene of the fire is also located in the evidence locker. The prosecution will make this evidence available to the defense. Resolution of this discovery issue is still pending.

10. Regarding D033, Notice of Motion (US-Canadian Correspondence), State department has found some relevant documents, which the prosecution will look at next week. Resolution of this discovery issue is still pending. The defense counsel noted that the Canadian Government representative present for the hearing stated that Canada has documents relevant to the case and wants to know what level of protection the documents should receive if released to defense counsel pursuant to the Canadian litigation in Mr. Khadr's case. Resolution of this discovery issue is still pending.

11. Regarding D035, Notice of Motion (Interrogators ID), the government intends to file a motion to reconsider.

12. Regarding D036, MTC (Manuals & SOPs), the government has numerous manuals and SOPs (approximately 675 pages) in effect during the time periods that the accused was interrogated. The government will continue to gather all manuals and SOPs that would have been in effect during interrogations of the accused.

13. Regarding D048, Notice of Motion (SERE SOP), the government said that it did not intend to produce this document because it was never adopted as policy, so it is not relevant. There is also an additional interrogation manual the government has reviewed and does not intend to produce. Resolution of this discovery issue is still pending.

14. Regarding D037, Notice of Motion (Videos, Audio, Photos), the government can only find one video, which is the video of the Canadian interrogation. It is in the process of making a copy of this video for the defense. The government did not locate any photos or videos taken in connection with changing the accused's bandages in Bagram or during medical exams. Resolution of this discovery issue is still pending.

15. Regarding D038, Notice of Motion (Classified Report), the government has produced an unclassified summary to the defense.

16. Regarding D041, MTC (██████ Documents), the prosecution has an MCRE 505 filing for the military judge today that relates to this motion. It is a declaration that says the documents the defense seeks do not contain derogatory information. The defense explained that it also requested information relating to ██████'s training and experience. The government stated that ██████ has agreed to speak to the defense and that he would answer some questions about this, but may be limited in what he can say. The defense explained that because ██████ had an incentive to describe his training and experience in such a way as to make his conclusions regarding who threw the grenade credible, it was important to be able to independently verify ██████'s claims regarding his training and experience. The military judge stated the defense could raise this issue after talking to ██████.

17. Regarding D042, MTC (Intelligence Reports re Compound), the prosecution stated the defense has all the written intelligence reports that they have been able to locate after making requests of all appropriate USG agencies. It intends to produce an unclassified summary of classified information regarding the intelligence that led U.S. forces to the compound where the accused was captured after a protective order is entered regarding this document. Resolution of this discovery issue is still pending.

18. Regarding D043, MTC (DIMS), the prosecution is in the process of gathering the information. Resolution of this discovery issue is still pending.

19. Regarding D044, MTC (Various Individuals), the defense filed the motion on 7 April 2008, so the government is not yet prepared to respond. The government will respond in writing. Resolution of this discovery issue is still pending.

20. Regarding D045, Notice of Motion (al Qaeda membership lists), the defense filed it on 7 April 2008, so the government is not yet prepared

to respond. The government will respond in writing. Resolution of this discovery issue is still pending.

21. Regarding D046, Notice of Motion (Identity of Co-conspirators), the defense filed it on 7 April 2008, so the government is not yet prepared to respond. The government will respond in writing. Resolution of this discovery issue is still pending.

22. Regarding D047, Special Request for Relief to Strike Additional Language from Charge III based on the ruling for D019 and filed on 9 April 2008, the government will respond in writing. Resolution of this discovery issue is still pending.

23. Regarding D049, MTC (LIFG), the government stated that the request was overbroad, the defense had not described how the requested documents would material to the preparation of the defense and that it would respond in writing. Resolution of this discovery issue is still pending.

24. Regarding D051, Notice of Motion (Recruitment of Child Soldiers), the defense filed it on 9 April 2008, so the government is not yet prepared to respond. The government will respond in writing. Resolution of this discovery issue is still pending.

25. Regarding D052, Notice of Motion (SOPs re Minors), the government stated that it is expending tremendous resources looking for documents. The defense explained that if the government has detained and treated the accused in a manner that does not comply with applicable SOPs, that fact is admissible as mitigating evidence for sentencing. The military judge stated that he would give the prosecution an opportunity to respond in writing.

26. Regarding D053, Notice of Motion (Investigator Notes), the prosecution stated that there is no reason to produce the notes since they are incorporated in the Form 40s. The military judge stated that the prosecution could respond in writing.

27. The defense inquired as to whether the Notices of Motion would become part of the record and made publicly available. The military judge said that they would be. The military judge invited the defense to let him know for which motions or notices of motions the parties had completed the filings that had not yet been released.

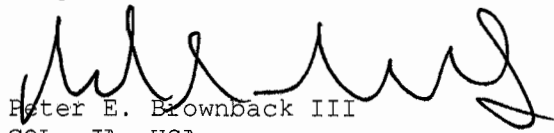
28. The defense asked if the temperature in the courtroom could be raised because counsel and the client were extremely cold during the last hearing. The military judge asked Capt Petty to handle the issue.

29. The defense noted that after the last hearing, discovery materials were taken from the client's box where his commissions legal materials are kept. When he asked for the documents, he was brought an empty box. The defense explained that the detainees are allowed to have access to habeas legal materials without transport, but to see commissions legal materials they must be transported and shackled. The prosecution explained that they had been told about a stamping policy whereby legal materials could be marked as such, but that stamping legal materials was not required. The defense also explained that the JTF intended to implement a policy that all notes taken during client

meetings are classified, but that there was no mechanism to "declassify" the notes. The military judge asked Capt Petty to obtain a copy of the stamping policy, the classification of notes policy, and the policy as to what documents can be reviewed where. Captain Petty asked the defense to approach him regarding any problems they are having related to meeting with their client or preparing a defense.

30. The defense stated that it intended to file another discovery motion in which it would seek documents relating to the principle of *tu quoque*.

31. This summary was agreed to by defense counsel (on 11 April) and government counsel (on 12 April) before it was signed by the military judge.



Peter E. Brownback III
COL, JA, USA
Military Judge

CF: All attendees.

The following is a summary of an RMC 802 conference held at 1700 hours, 7 May 2008, at Guantanamo Bay, Cuba.

1. The following were present:

- a. The Military Judge, COL Peter Brownback
- b. Government Counsel, Maj Jeff Groharing, CPT Keith Petty, SSG Guadalupe Ona
- c. Defense Counsel, LCDR Bill Kuebler, Ms. Rebecca Snyder, Mr. Nathan Whitling, SSG Rebekah Stuyvesant
- d. Col Parrish was present, but did not participate in the conference

2. The parties discussed the status of each of the outstanding discovery motions and notice of motions filed by the defense.

3. Regarding D025, MTC (eyewitnesses), the prosecution has provided an updated list identifying individuals who were present at the firefight resulting in the accused's capture. The Government is not going to search for additional information absent a specific defense request demonstrating how locating a particular individual is necessary. The government has previously provided statements for eight additional individuals not listed on the list provided to the Defense. If the defense wishes to speak to these witness, it must notify the government.

4. Regarding D029, MTC (Mr. Khadr's statements), the defense explained that the government has produced approximately 144 unclassified summaries of interrogations of Mr. Khadr. The government allowed the defense to review notes for 59 unclassified interrogation summaries pursuant to the military judge's order. The defense explained that no handwritten notes have been provided for the first 30 interrogation summaries. The government explained that the interrogation summaries from Bagram are considered to be notes even though they are typewritten. The government has asked CENTCOM for handwritten notes from interrogations, has received some negative replies and is waiting to receive the rest of the replies.

5. Regarding D031, Notice of Motion (Physical Evidence), the government has not located any more physical evidence. The original bomb-making video is located in GTMO, but can't be played here because it is 8mm film. The flag is located in Crystal City and the Bible is located at Ft Belvoir.

6. Regarding D032, Notice of Motion (Docs regarding capture & detention), the government intends to produce additional reports and documents from the other special operations group next week.

7. Regarding D033, Notice of Motion (US-Canadian Correspondence), the government explained that Mr. Murphy completed reviewing the documents at the State Department on Friday that it will disclose to the defense next week. Initially, the government asked for documents regarding the accused and the 27 July 2002 firefight and the State Department provided a small number of documents related to the accused, which the government determined were not discoverable to the defense. After the March session, the government asked the State Department to search for documents containing communications between Canada and the U.S. during the relevant period. They produced documents that Mr. Murphy reviewed last week. The government said the State Department has a number of documents regarding the accused's father that the government does not intend to produce. The defense stated that this was the first time they had heard the State Department has such documents and that the defense requested

documents relating to Ahmed Said Khadr, the accused's father and an alleged co-conspirator, in November 2007 in connection with Charge III. The defense also explained that documents regarding Ahmed Said Khadr and his connections to al Qaeda and those alleged to be involved with al Qaeda may be relevant evidence in mitigation.

8. The military judge issued a classified protective order regarding D035, Notice of Motion (identification of interrogators), today.

9. Regarding D036, MTC (Manuals & SOPs), the government does not intend to produce any more manuals or SOPs.

10. Regarding D037, MTC (video, audio, photos), the government has allowed the defense to view the DVDs of Mr. Khadr's interrogations. The government is attempting to improve the sound on one of the DVDs as was done for other DVDs. The defense asked whether the DVDs will be declassified once the interrogators' faces are covered up and explained that the content of the interrogations exists in unclassified documents. The defense stated that it would like to show the DVDs to an expert. The government stated that it would try to declassify them or obtain permission for an expert to view them.

11. D038, MTC (classified report), is complete.

12. Regarding D041, MTC (documents relating to OC1), the defense will review the motion in light of protective order number 4.

13. Regarding D042, MTC (intel reports), the defense will review the motion in light of protective order number 4.

14. Regarding D043, MTC (DIMS), the government agrees that portions of the DIMS reports are relevant and asked the Defense to narrow their request. The defense was viewed two binders of DIMS and flagged the pages they needed in one of the binders. For the other binder, the Defense explained that the nature of the documents and inability to compare them to their files at their office makes reviewing the documents away from their office difficult and time consuming. The government advised that the JTF has not authorized release of the documents to the Defense without redactions to names of guards and other information.

15. The defense requested oral argument on D044, D045, D046, D048, D049, D050, D051, and D053. Neither the defense nor government desires to argue D047.

16. Regarding D052, MTC (US SOPs re treatment of children), the government will produce one CENTCOM document to the defense and JTF is still looking for responsive documents. In light of this, the parties do not intend to argue this motion tomorrow.

17. Regarding D054, MTC (BTIF inspection), MAJ Kinnenbeck completed the BTIF tour. The government has received 8 - 10 classified photos from BTIF personnel that according to BTIF personnel, don't bear any resemblance to the BTIF as it looked when the accused was there. The government will allow the defense to view the documents. The military judge considers D054 to be complete and that the defense should inform the judge if there is anything further on this motion.

18. Regarding D055, Motion to Amend Charge IV, the parties intend to argue it tomorrow. The prosecution filed a response that the military judge did not receive. The government will ensure it is sent to the military judge.

19. Regarding MJ012, Brief regarding the Relevance of Pre-June 2002 Activities, the military judge has received five documents that are briefs, responses, and replies that are still being reviewed.

20. The defense made the military judge aware that they submitted a supplemental discovery request to the government earlier this week based on discovery the defense has received in the last few weeks.

21. The defense explained to the military judge that they have been interviewing child experts and psychologists. The defense does not have any experience with juvenile justice issues and believes it would be more efficient to bring on a civilian attorney with juvenile justice experience than for the defense to take the time necessary to become competent to litigate juvenile related issues. The defense are currently working through funding for the civilian attorney issues, but wanted to give the judge notice that a new counsel may be at the next hearing.

22. The military judge stated that he will set a date for evidentiary motions to be due on 28 May 08, but if more time is needed and/or it is necessary to incorporate outstanding discovery issues, the parties should ask for relief.

23. The military judge stated that he will set the evidentiary motions hearing for 18-19 June 08.

24. The government requested the military judge issue a trial date.

25. The Defense objected to issuance of a trial date.

26. This summary was agreed to by defense counsel and government counsel before it was signed by the military judge.

Peter E. Brownback III
COL, JA, USA
Military Judge
8 May 2008

Khadr - Motions Status Summary a/o 9 May 2008
V2 after RMC 802 Conference at 0830

Includes information from Filings Inventory, RMC 802 Conferences, and Transcripts

P-001 Complete
P-002 Complete
P-003 Pending – a) CA action on witness request, b) MJ ruling on MJ-012
P-004 Complete
P-005 Complete
P-006 Complete

D-001 Complete
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D-006 Complete
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D-029 TC waiting for final confirmation from CENTCOM that no subordinate units/agencies have any other notes. Once received, TC will advise DC.

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D-031 Action complete. If DC want more, they will make a new request. MJ will file a determination.

D-032 Government still working on finding post-action reports. Gov't looking for casualty reports. This motion subsumes D-050. ROT 11 Apr 08. **Gov't believes that some report will be declassified next week. ROT 8 May.**

D-033 Government was to review DOS documents week of 15 April. ROT 11 Apr 08. **Mr. Murphy has completed review and should get documents next week. TC will advise DC of what documents it is not providing. TC stated some documents re Khadr's father – DC demanded research on them. TC will search and advise. ROT 8 May 08.**

D-034 This motion is subsumed by D-027. ROT 11 Apr 08. **Action complete. If DC want more they will make a new request. MJ will file a determination in the matter.**

D-035 MJ issued ruling. Government email dated 2 April 2008 said it was going to file motion to reconsider. Still not received. ROT 11 Apr 08. **Government will file a classified request for reconsideration in Gitmo o/a 6 May – TC – 30 Apr. TC filed classified request for reconsideration 6 May, not signed. MJ signed revised order 7 May. Action complete.**

D-036 Government is still searching for Manuals and SOPs. ROT 11 Apr 08. **Parties still discussing OGA manuals. TC/DC talk re submitting written interrogatories thru TC to OGA re certain techniques. ROT 8 May.**

D-037 Government trying (a/o 11 Apr) to make copy of one video for DC. Government did not locate any other videos or photos. ROT 11 Apr 08. **Still tech problems with face changing on tape. Plus TC, at DC request, trying to get video declassified if tech problem solved. ROT 8 May.**

D-038 Government gave unclassified version of report. DC will advise if it wants more. ROT 11 Apr 08. **Action complete. MJ will file a determination in the matter.**

D-039 Complete

D-040 Complete

D-041 No action by MJ until DC reviews in light of Pro Ord #4. ROT 11 Apr 08. **DC still reviewing in light of Pro Ord #4. ROT 8 May.**

D-042 No action by MJ until DC reviews in light of Pro Ord #4. ROT 11 Apr 08. **DC still reviewing in light of Pro Ord #4. ROT 8 May.**

D-043 No response from government. Will one be furnished? ROT 11 Apr 08. DC - 27 Apr 08 indicates that gov't has provided discovery. Problems with means of discovery. TC - 30 Apr - will work w/DC w/in constraints of maintaining control of documents. **Problem mutated. MJ issued oral ruling, will issue final ruling in writing. Ruling include furnishing DIMS Binder 2 by 22 May 1700 hours. TC will discuss with JTF need to cooperate w/information requests or face lengthy delay in trial. ROT 8 May.**

D-044 Response filed. a) Does DC want to reply? No - DC 29 Apr. b) Does either side want further oral argument? Yes - DC 30 Apr. **Both sides argued this motion w/D-049. MJ will issue ruling. ROT 8 May.**

D-045 Response filed. a) Does DC want to reply? No - DC 29 Apr. b) Does either side want further oral argument? Yes - DC 30 Apr. **Both sides argued. MJ will issue ruling. ROT 8 May.**

D-046 Response filed. a) Does DC want to reply? No - DC 29 Apr. b) Does either side want further oral argument? Yes - DC 30 Apr. **Both sides argued. MJ will issue ruling. ROT 8 May.**

D-047 Response filed. a) Does DC want to reply? No - DC 29 Apr. b) Does either side want further oral argument? No - DC 29 Apr. **With MJ for decision.**

D-048 Response filed. a) Does DC want to reply? No - DC 29 Apr. b) Does either side want further oral argument? Yes - DC 30 Apr. **Both sides argued. MJ will issue ruling. ROT 8 May.**

D-049 Response filed. a) Does DC want to reply? No - DC 29 Apr. b) Does either side want further oral argument? Yes - DC 30 Apr. **Both sides argued this motion w/D-044. MJ will issue ruling. ROT 8 May.**

D-050 This motion is subsumed by D-032. ROT 11 Apr 08.

D-051 Response filed. a) Does DC want to reply? No - DC 29 Apr. b) Does either side want further oral argument? Yes - DC 30 Apr. **Both sides argued. MJ will issue ruling. ROT 8 May.**

D-052 No response received. Does either side want oral argument? Yes - DC 30 Apr. Government working to find documents - TC 30 Apr. **No argument. TC has found at least two documents. Still searching. ROT 8 May.**

D-053 Response filed. a) Does DC want to reply? No – DC 29 Apr. b) Does either side want further oral argument? Yes – DC 30 Apr. **Both sides argued. MJ will issue ruling. ROT 8 May.**

D-054 Complete.

D-055 Motion filed. Response **received. Both sides argued. MJ will issue ruling. ROT 8 May.**

MJ-001 Complete

MJ-002 Complete

MJ-003 Complete

MJ-004 Complete

MJ-005 Complete

MJ-006 Complete

MJ-007 Complete

MJ-008 Complete

MJ-009 With MJ for decisions on trial schedule. **MJ set certain dates on the record. Will supplement with formal ruling. Both sides argued. ROT 8 May.**

MJ-010 Complete

MJ-011 Complete

MJ-012 Parties have submitted briefs, **responses to briefs, and DC reply to response. MJ declined to hear argument on motion on 8 May.**

**UNITED STATES
OF
AMERICA**

**D-047
Defense Special Request for Relief in light of the
commission's ruling on D-019 to Strike Surplus
Language from Charge III**

v

OMAR AHMED KHADR
a/k/a "Akhbar Farhad"
a/k/a "Akhbar Farnad"
a/k/a "Ahmed Muhammed Khahi"

Ruling

1. The defense filed this special request for relief by email on 9 April 2008. The government responded on 22 April 2008. Neither party chose to argue the motion on the record on 8 May 2007.
2. The commission adheres to its ruling in D-019 and the matters and analysis contained therein. The language requested to be stricken is hereby deleted.
3. The Specification of Charge III shall now read as follows:

Specification: In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in and around Afghanistan, from at least June 1, 2002, to on or about July 27, 2002, conspire and agree with Usama bin Laden, Ayman al Zawahiri, Sheikh Sayeed al Masri, Saif al Adel, Ahmed Sa'id Khadr (a/k/a Abu Al-Rahrnan Al-Kanadi), and various other members and associates of the al Qaeda organization, known and unknown; said agreement to commit the following offenses triable by military commission: attacking civilians; attacking civilian objects; murder in violation of the law of war; destruction of property in violation of the law of war; and terrorism.

In furtherance of this agreement or enterprise, Omar Khadr knowingly committed overt acts, including, but not limited to, the following:

1. In or about June 2002, Khadr received approximately one month of one-on-one, private al Qaeda basic training from an al Qaeda member named "Abu Haddi.", consisting of training in the use of rocket propelled grenades, rifles, pistols, hand grenades, and explosives.
2. In or about June 2002, Khadr conducted surveillance and reconnaissance against the U.S. military in support of efforts to target U.S. forces in Afghanistan.
3. In or about July 2002, Khadr attended one month of land mine training.

4. In or about July 2002, Khadr joined a group of Al Qaeda operatives and converted land mines to improvised explosive devices and planted said improvised explosive devices in the ground where; based on previous surveillance, U.S. troops were expected to be traveling.
 5. On or about July 27, 2002, Khadr engaged U.S. military and coalition personnel with small arms fire, killing two Afghan Militia Force members.
 6. Khadr threw and/or fired grenades at nearby coalition forces resulting in numerous injuries.
 7. When U.S. forces entered the compound upon completion of the firefight, Khadr threw a grenade, killing Sergeant First Class Christopher Speer.
4. The defense special request for relief is granted.

Peter E. Brownback III
COL, JA, USA
Military Judge

[REDACTED]

From: Kuebler, William LCDR [REDACTED]
Sent: Wednesday, April 09, 2008 2:32 PM
To: Brownback, Peter E. [REDACTED]; Petty, Keith A CPT USSOUTHCOM
JTFGTMO; [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED];
[REDACTED]

Subject: Defense Special Request for Relief

Sir,

1. In light of the Commission's ruling on D-019, the defense respectfully requests that the Military Judge strike the following additional language from Charge III as surplussage:

"on September 11, 2001, and further attacks, continuing to date against the United States".

2. The same rationale asserted in the defense motion applies with respect to the language above and the arguments made in D-019 are incorporated herein by reference.

V/R

LCDR Kuebler

UNITED STATES OF AMERICA

D047

GOVERNMENT'S RESPONSE

v.

To the Defense Special Request for Relief
in light of the commission's ruling on D-
019 to Strike Surplus Language from
Charge III

OMAR AHMED KHADR
a/k/a "Akhbar Farhad"
a/k/a "Akhbar Farnad"
a/k/a "Ahmed Muhammed Khali"

22 April 2008

1. **Timeliness:** This motion is filed within the timelines established by the Military Judge.

2. **Relief Requested:** The Government respectfully submits that the Defense Motion to Strike the Language "on September 11, 2001, and further attacks, continuing to date against the United States" should be denied, and further submits that the Military Judge re-insert that language struck from the charge sheet in his ruling on D019, specifically "al Qaeda, founded by Usama bin Laden, in or about 1989, that has engaged in hostilities against the United States, including attacks against the American Embassies in Kenya and Tanzania in August 1998, the attack against the *U.S.S. Cole* in October 2000, and attacks on the United States."

3. **Overview:** The language citing "on September 11, 2001, and further attacks, continuing to date against the United States," as well as the language "al Qaeda, founded by Usama bin Laden, in or about 1989, that has engaged in hostilities against the United States, including attacks against the American Embassies in Kenya and Tanzania in August 1998, the attack against the *U.S.S. Cole* in October 2000, and attacks on the United States..." are all facts pertinent to the criminal conduct alleged in the charges. As the Manual for Military Commissions (MMC) states that the specification may be in any format, and the language in Charge III is properly plead. The Defense motion should therefore be denied.

4. **Burden and Persuasion:** The government does not agree with the Defense assertion, as originally articulated in its motion D-019 and therefore adopted for purposes of this motion, that this is a challenge to the subject matter jurisdiction of the military commission. As the accused is charged with Conspiracy, and the defense is not challenging the subject matter jurisdiction of the crime of Conspiracy *in this motion*, this motion is simply an attempt to litigate the proper elements of an offense and the propriety of certain language contained within a specification. Such a motion is not considered to be a motion to dismiss for lack of jurisdiction, therefore the burden of persuasion resides with the Defense as the moving party. See MMC 905(c)2(B).

5. Discussion:

a. The Defense moves this Military Commission to strike the following language from Charge III: “on September 11, 2001, and further attacks, continuing to date against the United States.” The defense motion should be denied. Because of the ruling in D-019, which struck other language that gave proper context to the above language, the Government respectfully requests that the Military Judge reconsider his decision to strike certain language and re-insert the language in the charge sheet, specifically “al Qaeda, founded by Usama bin Laden, in or about 1989, that has engaged in hostilities against the United States, including attacks against the American Embassies in Kenya and Tanzania in August 1998, the attack against the *U.S.S. Cole* in October 2000, and attacks on the United States.”¹

The Language Cited by the Defense in Charge III is Not Surplusage

b. The challenged language in the charge sheet is simply not surplusage. Surplusage is defined, at least in part, by the discussion under R.M.C. 906(b)(3), as language that includes irrelevant or redundant details or aggravating circumstances which are not necessary to enhance the maximum authorized punishment or to explain the essential facts of the case. The East Africa Embassy Bombings, the attack on the *U.S.S. Cole*, and the attacks on 11 September 2001 all constitute armed attacks, committed by al Qaeda in violation of the Law of War, to which the laws of armed conflict govern, and as such constitutes proof of the armed conflict between al Qaeda and the United States and the nature and scope of the conspiracy alleged. These are relevant facts to the case and were properly charged in the first instance.

c. The Government believes the Military Judge’s ruling on D-019 was in error, specifically in striking the language regarding the attacks on the embassies and the *U.S.S. Cole*, and should be reconsidered. For the above-stated reasons, and the reasons included in the Government response on D019, the reference to the 9/11 attacks and attacks continuing to date should be allowed to remain on the charge sheet. However, as currently drafted, without the language that was stricken as a result of the military judge’s ruling in D-019, the remaining language appears in a nonsensical way. For this and the foregoing reasons, the Government requests that the Military Judge re-insert the other language in the charge sheet regarding the attacks on the United States Embassies and the *U.S.S. Cole*.

6. Conclusion: As all of the details cited in the Government’s charge are relevant to explain the essential facts of the case, and are directly relevant to the underlying offenses, the language does not constitute surplusage. Accordingly, the Defense motion should be denied and the prior language, stricken by the Military Judge in D-019, be re-inserted into the charge sheet.

¹ Please see the Gov’t filing on MJ012 for a detailed discussion regarding the relevance of the 11 September 2001 attacks and other pre- June 2002 conduct by al Qaeda members and associates. The Government respectfully requests the Military Judge consider matters raised by the Government in that filing when making his ruling on D-047.

7. **Oral Argument:** The Government does not request oral argument
8. **Witnesses and Evidence:** None.
9. **Certificate of Conference:** N/A
10. **Additional Information:** None.
11. **Submitted by:**

//s//

Jeffrey D. Groharing
Major, U.S. Marine Corps
Prosecutor

Keith A. Petty
Captain, U.S. Army
Assistant Prosecutor

John F. Murphy
Assistant Prosecutor
Assistant U.S. Attorney

[REDACTED]

From: [REDACTED]

Friday, May 09, 2008 7:01 PM

To: [REDACTED]

Subject: FW: MJ-012/D-047 - Government Special Request for relief

Attachments: D047 - Gov't response.doc



D047 - Gov't
response.doc (47 ...)

-----Original Message-----

v]

[REDACTED]

overnment Special Request for relief

Sir,

Gov't response to D047 is attached.

V/R,

Major Groharing

[REDACTED]

est for relief US v Khadr

See COL Brownback's email below.

v/r,

[REDACTED] USAR

Department Special

The request below is approved.

Special Request for relief

Sir,

- $V/r,$

[illegible]

[REDACTED]

Special Report

COL Brownback

From: [REDACTED]

[REDACTED]

[REDACTED]

Sent: Thursday, April 17, 2008 6:16 PM

Subject: Special Request for relief

Sir,

In light of the common issues presented, the government respectfully requests permission to file our reponses to D047 and MJ12 in the same brief.

V/R,

Jeff Groharing
Major, U.S. Marine Corps

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] and D051 through D053

Per COL Brownback, the government request for extension to respond to D044 through D049 and D051 through D053 is granted.

v/r,

[REDACTED]

Military Commissions Trial Judiciary
Department of Defense

[REDACTED]

Sir,

The Government respectfully requests until COB 21 April 2008 to respond to the subject filings.

V/R,

Jeff Groharing
[REDACTED] . Marine Corps
[REDACTED]
[REDACTED]
[REDACTED]

**UNITED STATES
OF
AMERICA**

**D-050
Defense Notice of Motion for To Compel
Production of Documents (Reports relating to
“Other Special Operations Unit”)**

9 May 2008

v

OMAR AHMED KHADR
a/k/a “Akhbar Farhad”
a/k/a “Akhbar Farnad”
a/k/a “Ahmed Muhammed Khahi”

Determination and Ruling

1. The defense filed this notice of motion on 9 April 2008. The military judge has not at any time required that the defense provide a motion as contemplated by the Rules of Court. The government did not file a response. At an RMC 802 conference on 10 April and on the record on 11 April, the parties agreed that this matter was subsumed by D-032. .” Other than the original motion filed by the defense, no other pleadings concerning this motion were filed by either party.
2. Documents discussed in paragraph 1 will be contained in the Appellate Exhibit which contains this motion.
3. The commission determines that the government has satisfied the requirements of RMC 701 in connection with this motion. Any further requests by the defense in connection with the subject of this motion will be made in the context of a new discovery request.
4. The commission rules that action by the parties and the commission on this motion is now Final.

Peter E. Brownback III
COL, JA, USA
Military Judge

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

**Notice of Defense Motion
To Compel Production of Documents
(Reports relating to “Other Special
Operations Unit”)**

9 April 2008

1. **Timeliness:** This notice of motion is filed within the timeframe established by the Military Judge’s 15 March 2008 e-mail order.

2. **Notice of motion:** On or about 11 April 2008, the defense shall move this Military Commission for an order directing the government to produce the following documents or materials: all after action reports, casualty reports, situation reports, operational reports, message traffic to higher headquarters (or other commands or agencies), or similar documents, prepared by or on behalf of what LTC W identified on 3 April 2008 as “another special operations unit” not under his formal command and control that was present at the 27 July 2002 firefight; and any after action reviews, operational summaries or evaluations prepared by higher headquarters of that unit’s actions in connection with the 27 July 2002 firefight. These documents are within the scope of the defense on 9 November 2008 for documents relating to the capture and detention of the accused and/or the 27 July 2002 firefight. (Def. Discovery Req. of 9 Nov 07, ¶ 27 (Attachment D to D-025 Def. Mot. to Compel Discovery (Eyewitnesses)).)

3. **Summary of basis for motion:**

a. During a deposition of LTC W conducted on 3 April 2008, the defense learned that several of the U.S. soldiers who participated in (or were otherwise present at) the 27 July 2002 firefight, including Sgt. Speer, were members of what LTC W described as “another special operations unit.”¹ This unit, according to LTC W, did not operate under his formal command and control, had a separate reporting chain, and would have been responsible for preparing its own after action or casualty reports, including whatever report was prepared in connection with the injury to Sgt. Speer. Reports prepared by this unit are likely to be particularly relevant to key factual issues in this case because members of that unit (apparently not interviewed until December of 2005) claim that U.S. forces were employing hand grenades against suspected combatants in the Khost compound at the conclusion of the firefight.²

¹ LTC W’s deposition has not yet been transcribed. The assertions herein are based on counsels’ notes and recollection of the deposition.

² See [REDACTED] (interview of “Soldier #2,” attachment A) (“During the final assault on the compound [REDACTED] approximately three explosions.”); [REDACTED] 5 (interview of [REDACTED] attachment B) [REDACTED] moved to the Northeast corner of the compound, threw several grenades into the corner and cleared the area.”); [REDACTED] (interview of [REDACTED] attachment C) (“When the assault team arrived at the

Members of that unit also recall seeing movement in the compound before entering.³ One member claims to have seen a grenade next to the hand of one of the dead combatants dragged out of the “alley” in which Mr. Khadr was shot.⁴ These are, of course, highly significant (and potentially exculpatory) facts, which do not appear in LTC W’s reports (or comport with his recollection of events).⁵ Their documentation (and possibly additional information) is more likely to be included in reports prepared by the unit to which these soldiers belonged.⁶

b. In response to D032 (Defense Notice of Motion to Compel the Production of Documents regarding the Capture and Detention of Mr. Khadr), the military judge instructed the government to determine what unit or units and U.S. elements were involved in the firefight and whether there was an after action or other report of activity prepared by any of them. The military judge also instructed the government to search for relevant message traffic from 27 July to 8 August 2002. The reports the defense seeks are within the scope of the defense request on 9 November 2008 and the instruction of the military judge. No documents responsive to this request have been provided to the defense since the last discovery hearing in March 2008.

4. **Oral Argument:** The defense requests oral argument as it is entitled to pursuant to R.M.C. 905(h) (“Upon request, either party is entitled to an R.M.C. 803 session to present oral argument or have evidentiary hearing concerning the disposition of written motions.”). Oral argument will allow for a thorough consideration of the issues.

5. **Witnesses and evidence:** The defense does not anticipate the need to call witnesses in connection with this motion, but reserves the right to do so should the prosecution’s response raise issues requiring rebuttal testimony. The defense relies on the following as evidence:

compound’s South Wall [REDACTED]

³ See Attachment A [REDACTED] contacted them and stated he observed movement inside the compound.”) [REDACTED] (interview of [REDACTED] stated prior to the QRF going into the compound, [REDACTED] observed movement in the corner of the compound and radioed the QRF to advise them.”).

[REDACTED] (interview of [REDACTED] attachment F) [REDACTED]

⁵ During his deposition, LTC W indicated that he only recalled hearing one grenade detonate in the course of the final assault.

⁶ These soldiers’ accounts are consistent with what would seem to be common sense. In his deposition, LTC W indicated that following the final air strike, but before the assault element entered the compound, he attempted to order a “Humvee” with a mounted Mark 19 “grenade machine gun” to conduct a sweep of the compound and fire at various locations. The Mark 19 malfunctioned. Unable to suppress remaining combatants with the Mark 19, and knowing there was movement in the compound, it stands to reason that members of the assault element would have used hand grenades against suspected enemy positions before entering. In the absence of any eyewitness who can say that Mr. Khadr (or the other enemy combatant subsequently killed by [REDACTED]) threw a hand grenade, it is certainly possible that Sgt. Speer was wounded by a hand grenade thrown by U.S. forces.

Attachments A - F

6. **Certificate of conference:** The defense and prosecution have conferred. The prosecution objects to the relief requested.

7. **Additional Information:** In making this motion, or any other motion, Mr. Khadr does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this Military Commission to charge him, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in and all appropriate forms.

8. **Attachments:**

- A. [REDACTED]
- B. [REDACTED]
- C. [REDACTED]
- D. [REDACTED]
- E. [REDACTED]
- F. [REDACTED]

/s/

William C. Kuebler
LCDR, JAGC, USN
Detailed Defense Counsel

Rebecca S. Snyder
Assistant Detailed Defense Counsel

**CRIMINAL INVESTIGATION TASK FORCE (CITF)
REPORT OF INVESTIGATIVE ACTIVITY**

1. DATE OF INVESTIGATIVE ACTIVITY

01 Dec 05

2. PLACE

Fort Belvoir, VA

3. ACTIVITY NUMBER

4. REMARKS

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AE 109 (Khadr)
Page 5 of 23

00766-001029

4. REMARKS (Continued)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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00766-001030

**CRIMINAL INVESTIGATION TASK FORCE (CITF)
REPORT OF INVESTIGATIVE ACTIVITY**

1. DATE OF INVESTIGATIVE ACTIVITY

07 Dec 05

2. PLACE

Fort Bragg, NC

3. ACTIVITY NUMBER

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AE 109 (Khadr)
Page 7 of 23

00766-001031

4. REMARKS (Continued)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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07 Dec 05

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Fort Bragg, NC

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AE 109 (Khadr)
Page 9 of 23

00766-001034

4. REMARKS (Continued)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

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**CRIMINAL INVESTIGATION TASK FORCE (CITF)
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07 Dec 05

2. PLACE

Fort Bragg, NC

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AE 109 (Khadr)
Page 12 of 23

00766-001039

4. REMARKS (Continued)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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**CRIMINAL INVESTIGATION TASK FORCE (CITF)
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Fort Bragg, NC

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AE 109 (Khadr)
Page 14 of 23

00766-001045

4. REMARKS (Continued)

[REDACTED]

[REDACTED]

[REDACTED]

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00766-001046

CRIMINAL INVESTIGATION TASK FORCE (CITF)
REPORT OF INVESTIGATIVE ACTIVITY

1. DATE OF INVESTIGATIVE ACTIVITY

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2. PLACE

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3. ACTIVITY NUMBER

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AE 109 (Khadr)
Page 16 of 23

00766-001049

4. REMARKS (Continued)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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4. REMARKS (Continued)

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AE 109 (Khadr)
Page 18 of 23

00766-001051

12 April 2008

Subject: Summary - RMC 802 Conference - 10 April 2008

The following is a summary of an RMC 802 conference held at 1000 hours, 10 April 2008, at Guantanamo Bay, Cuba.

1. The following were present:

- a. The Military Judge, COL Peter Brownback
- b. Government Counsel, Maj Jeff Groharing, CPT Keith Petty, Mr. John Murphy, SSG Guadalupe Ona
- c. Defense Counsel, LCDR Bill Kuebler, Ms. Rebecca Snyder, SSG Rebekah Stuyvesant

2. The parties discussed the status of each of the outstanding discovery issues raised and/or litigated at the hearing on 13 March 2008, supplemental defense discovery requests, as well as the motions and notice of motions filed by the defense since the last hearing.

3. Regarding D025, MTC (eyewitnesses), the prosecution has provided the defense a partial list of soldiers present in the vicinity of the firefight resulting in the accused's capture. The prosecution has requested additional information from each unit present at the firefight and will provide any updates we receive.

4. Regarding D050, Notice of Motion (Reports from other Special Operations Units), and D032 (Motion to Compel Documents re Capture & Detention), which subsumes D050, the government stated it has been able to locate a few additional documents related to the firefight and will provide them after appropriate redactions are made. The government has requested all units present to review their files as well as CENTCOM. Several units have advised the government that they do not have any responsive documents. The Government expects a comprehensive response from CENTCOM in the near future. The government stated that military units were not required to conduct death investigations for combat deaths until post-Tillman. The military judge suggested the government contact the "HRC" or like organization to attempt to find a "casualty report" related to SFC Chris Speer's death. Resolution of this discovery issue is still pending.

5. Regarding D026, MTC (documents relating to Charge III), at the March hearing the military judge directed the prosecution to determine whether it could obtain the requested documents. The prosecution has obtained them and does not intend to produce them because they are accurately summarized in the 9/11 Report. The government also contends they are not relevant because whether the alleged co-conspirator disagreed with the tactics of al Qaeda is irrelevant to whether there was an al Qaeda conspiracy. The defense explained that evidence that the individuals with whom Mr. Khadr is alleged to have conspired did not agree that particular attacks should be carried out is relevant. Resolution of this discovery issue is still pending. In response to the military judge's question regarding what the government can prove up in light of the dismissal of language from the conspiracy charge due to the Commission's ruling on D019, the prosecution responded that they intended to show an al Qaeda conspiracy was formed to accomplish certain objectives, that the organization is a conspiracy, that the

accused joined the conspiracy that was already existing in order to do the types of things al Qaeda had previously done. The prosecution explained that their proof would include evidence regarding the 9/11 attacks, the USS COLE Bombing, the embassy attacks, etc., and that this evidence goes to the accused's knowledge of what he joined. In response to the military judge questioning what the 9/11 attacks have to do with the accused since he is alleged to have joined the conspiracy in June 2002, the prosecution explained that it shows that the accused knew what kinds of things al Qaeda did when he joined the conspiracy. The defense stated that the government's proffer suggests that it still intends to prove liability based on a criminal enterprise theory; but the government must show a specific agreement to commit certain object offenses, which makes the documents even more relevant after the military judge's ruling on D019. The defense explained that it has established more than a baseline of materiality regarding the documents. Resolution of this discovery issue is still pending.

6. Regarding D027, MTC (Sgt C Docs), and D034 MTC (Bagram Abuse Investigation), the government produced 5132 pages to the defense on 3 April, which are all but a few subparts of the investigation. The defense will review the documents and notify the commission if there are any additional issues relating to these motions.

7. Regarding D029, MTC (Khadr's Statements), the government has produced three unclassified summaries approved by the Military Judge following an MCRE 505 hearing. The government intends to produce four more documents. There will be a summary produced in lieu of classified information for another one of those documents after an MCRE 505 hearing, which will have to be held sometime after this week. Resolution of this discovery issue is still pending.

8. Regarding D030, MTC (Docs re Davis Investigation), the government filed a motion to reconsider which will be addressed on the record tomorrow.

9. Regarding D031, Notice of Motion (Physical Evidence), the prosecution has learned that the original video found at the compound is located in an evidence locker at JTF. The prosecution was also advised that an English Bible that was purportedly found at the scene of the firefight is also located in the evidence locker. The prosecution will make this evidence available to the defense. Resolution of this discovery issue is still pending.

10. Regarding D033, Notice of Motion (US-Canadian Correspondence), State department has found some relevant documents, which the prosecution will look at next week. Resolution of this discovery issue is still pending. The defense counsel noted that the Canadian Government representative present for the hearing stated that Canada has documents relevant to the case and wants to know what level of protection the documents should receive if released to defense counsel pursuant to the Canadian litigation in Mr. Khadr's case. Resolution of this discovery issue is still pending.

11. Regarding D035, Notice of Motion (Interrogators ID), the government intends to file a motion to reconsider.

12. Regarding D036, MTC (Manuals & SOPs), the government has numerous manuals and SOPs (approximately 675 pages) in effect during the time periods that the accused was interrogated. The government will continue to gather all manuals and SOPs that would have been in effect during interrogations of the accused.

13. Regarding D048, Notice of Motion (SERE SOP), the government said that it did not intend to produce this document because it was never adopted as policy, so it is not relevant. There is also an additional interrogation manual the government has reviewed and does not intend to produce. Resolution of this discovery issue is still pending.

14. Regarding D037, Notice of Motion (Videos, Audio, Photos), the government can only find one video, which is the video of the Canadian interrogation. It is in the process of making a copy of this video for the defense. The government did not locate any photos or videos taken in connection with changing the accused's bandages in Bagram or during medical exams. Resolution of this discovery issue is still pending.

15. Regarding D038, Notice of Motion (Classified Report), the government has produced an unclassified summary to the defense.

16. Regarding D041, MTC (██████ Documents), the prosecution has an MCRE 505 filing for the military judge today that relates to this motion. It is a declaration that says the documents the defense seeks do not contain derogatory information. The defense explained that it also requested information relating to ██████'s training and experience. The government stated that ██████ has agreed to speak to the defense and that he would answer some questions about this, but may be limited in what he can say. The defense explained that because ██████ had an incentive to describe his training and experience in such a way as to make his conclusions regarding who threw the grenade credible, it was important to be able to independently verify ██████'s claims regarding his training and experience. The military judge stated the defense could raise this issue after talking to ██████

17. Regarding D042, MTC (Intelligence Reports re Compound), the prosecution stated the defense has all the written intelligence reports that they have been able to locate after making requests of all appropriate USG agencies. It intends to produce an unclassified summary of classified information regarding the intelligence that led U.S. forces to the compound where the accused was captured after a protective order is entered regarding this document. Resolution of this discovery issue is still pending.

18. Regarding D043, MTC (DIMS), the prosecution is in the process of gathering the information. Resolution of this discovery issue is still pending.

19. Regarding D044, MTC (Various Individuals), the defense filed the motion on 7 April 2008, so the government is not yet prepared to respond. The government will respond in writing. Resolution of this discovery issue is still pending.

20. Regarding D045, Notice of Motion (al Qaeda membership lists), the defense filed it on 7 April 2008, so the government is not yet prepared

to respond. The government will respond in writing. Resolution of this discovery issue is still pending.

21. Regarding D046, Notice of Motion (Identity of Co-conspirators), the defense filed it on 7 April 2008, so the government is not yet prepared to respond. The government will respond in writing. Resolution of this discovery issue is still pending.

22. Regarding D047, Special Request for Relief to Strike Additional Language from Charge III based on the ruling for D019 and filed on 9 April 2008, the government will respond in writing. Resolution of this discovery issue is still pending.

23. Regarding D049, MTC (LIFG), the government stated that the request was overbroad, the defense had not described how the requested documents would material to the preparation of the defense and that it would respond in writing. Resolution of this discovery issue is still pending.

24. Regarding D051, Notice of Motion (Recruitment of Child Soldiers), the defense filed it on 9 April 2008, so the government is not yet prepared to respond. The government will respond in writing. Resolution of this discovery issue is still pending.

25. Regarding D052, Notice of Motion (SOPs re Minors), the government stated that it is expending tremendous resources looking for documents. The defense explained that if the government has detained and treated the accused in a manner that does not comply with applicable SOPs, that fact is admissible as mitigating evidence for sentencing. The military judge stated that he would give the prosecution an opportunity to respond in writing.

26. Regarding D053, Notice of Motion (Investigator Notes), the prosecution stated that there is no reason to produce the notes since they are incorporated in the Form 40s. The military judge stated that the prosecution could respond in writing.

27. The defense inquired as to whether the Notices of Motion would become part of the record and made publicly available. The military judge said that they would be. The military judge invited the defense to let him know for which motions or notices of motions the parties had completed the filings that had not yet been released.

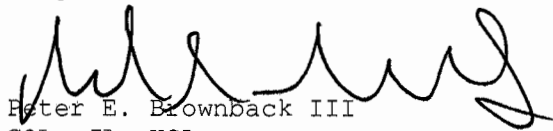
28. The defense asked if the temperature in the courtroom could be raised because counsel and the client were extremely cold during the last hearing. The military judge asked Capt Petty to handle the issue.

29. The defense noted that after the last hearing, discovery materials were taken from the client's box where his commissions legal materials are kept. When he asked for the documents, he was brought an empty box. The defense explained that the detainees are allowed to have access to habeas legal materials without transport, but to see commissions legal materials they must be transported and shackled. The prosecution explained that they had been told about a stamping policy whereby legal materials could be marked as such, but that stamping legal materials was not required. The defense also explained that the JTF intended to implement a policy that all notes taken during client

meetings are classified, but that there was no mechanism to "declassify" the notes. The military judge asked Capt Petty to obtain a copy of the stamping policy, the classification of notes policy, and the policy as to what documents can be reviewed where. Captain Petty asked the defense to approach him regarding any problems they are having related to meeting with their client or preparing a defense.

30. The defense stated that it intended to file another discovery motion in which it would seek documents relating to the principle of *tu quoque*.

31. This summary was agreed to by defense counsel (on 11 April) and government counsel (on 12 April) before it was signed by the military judge.

A handwritten signature in black ink, appearing to read "Peter E. Brownback III". The signature is fluid and cursive, with a large, stylized initial "P" and a long, sweeping horizontal stroke across the middle.

Peter E. Brownback III
COL, JA, USA
Military Judge

CF: All attendees.

**UNITED STATES
OF
AMERICA**

**D-043
Defense Motion To Compel Production of
Documents (DIMS)**

9 May 2008

v

OMAR AHMED KHADR
a/k/a "Akhbar Farhad"
a/k/a "Akhbar Farnad"
a/k/a "Ahmed Muhammed Khahi"

Ruling

1. The defense filed this motion on 7 April 2008. The government did not submit a response, but it provided the matters requested. On 27 April, the defense filed, by email, a special request for relief from the conditions by which the government was providing discovery. The government filed, by email, its response to the special request on 30 April. Both parties made oral argument on 8 May 2008. The commission issued a ruling on the record and supplements and confirms that ruling by this written ruling.

2. Based on the matters presented on the record and the concession by the government, the commission finds that Volume 2 of the DIMS material is relevant and necessary to the preparation of the defense case in general. The commission further finds that it is specifically relevant and necessary to the defense preparation of any motion to suppress statements allegedly made by the accused while detained at Guantanamo.

3. The commission recognizes the needs of the Joint Task Force – Guantanamo to protect personnel assigned thereto, both during and following such assignment. The commission finds that the defense counsel in this case have Secret or above security clearances and that their duties in connection with protected materials are governed, among many ways, by the Protective Orders issued by this commission.

4. The commission orders that a copy of Volume 2 of the DIMS material be provided to the defense NLT 1700 hours, 22 May 2008. The JTF-G may redact personal identifying matters from the copy furnished. If such copy is not furnished, the proceedings will abate until it is furnished.

5. The commission does not find that JTF-G has been intentionally or negligently derelict or dilatory in the furnishing of information requested by the defense in this case. Nor does the commission find that JTF-G has been intentionally or negligently obstructive in regards to furnishing such information. The commission recognizes that JTF-G has certain procedures which must be followed in order to insure that the command is aware of what is provided to outside agencies or persons. Further, the

commission recognizes that responding to requests from the defense and the commission are but a very minor portion of the requirements levied upon JTF-G. However, the commission advises the government, and is certain that the government will relay said advice to JTF-G, that, if requests from the defense are not responded to in a full and timely manner, discovery is delayed, and the trial schedule in this case may be significantly altered and delayed.

6. The defense motion is granted.

Peter E. Brownback III
COL, JA, USA
Military Judge

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

**Defense Motion
To Compel Production of Documents
(DIMS)**

7 April 2008

1. **Timeliness:** This motion is filed within the timeframe established by the Military Commission Trial Judiciary Rules of Court and the Military Judge's email order of 15 March 2008.

2. **Relief Sought:** The defense respectfully requests that this Commission order the government to produce the requested discovery, namely information relating to Mr. Khadr maintained by JTF-GTMO in the Detainee Information Management System (DIMS).

3. **Overview:** Mr. Khadr has been detained by JTF-GTMO since on or about 29 October 2002. While the defense has been hampered in its ability to develop precise information about the content of DIMS, the defense believes that it is a computer-based information system that tracks movement and administration of detainees. Production of this information is material to the preparation of the defense for trial. Mr. Khadr has made a number of allegations regarding his treatment at JTF-GTMO, including that he has been moved to less favorable facilities and/or had privileges taken away as a result of failing to "cooperate" with interrogators. If DIMS recorded these movements or actions and the timing thereof, it will serve to corroborate allegations Mr. Khadr has made. Moreover, DIMS may be expected to record allegations of mistreatment or abuse that would serve to corroborate claims made by Mr. Khadr. Finally, as a source of information concerning Mr. Khadr's general treatment and behavior over the last five years, DIMS records will likely provide a source of information relevant to extenuation and mitigation in the event Mr. Khadr is convicted on any charge.

4. **Burden of Proof:** The defense bears the burden of establishing, by a preponderance of the evidence, that it is entitled to the requested relief. R.M.C. 905(c)(2)(A).

5. **Facts:**

a. Upon learning of the existence of DIMS, the defense contacted JTF-GTMO, requesting the opportunity to speak with a knowledgeable person about the content of DIMS in order to develop a basis for a potential discovery request. JTF-GTMO refused to comply and directed the defense to submit a request through the prosecution. See [REDACTED] e-mail thread of 3 March 2008 (Attachment A).

b. On 5 March 2008, the defense requested the prosecution to produce "All records maintained by JTF-GTMO in the Detainee Information Management System (DIMS) concerning the accused." Def. Supp. Req. for Discovery, 5 Mar 08 (Attachment A to D-041). On or about

20 March 2008, the prosecution denied the request. Govt. Resp. to Def. Supp. Req. for Discovery, 20 Mar 08, para. 1(e) (Attachment B to D-041).

c. On 31 March 2008, the defense again sought the opportunity to speak with a knowledgeable individual about the contents of DIMS so that it could resolve the issue without need for a motion. *See* CPT Keith Petty e-mail thread of 1 April 2008 (Attachment B). Again, the government denied the defense this opportunity and required the defense to submit any requests for information, in writing, to JTF-GTMO, through the prosecution. In the interests of facilitating the progress of discovery, the defense complied, providing the prosecution with a list of questions. *See* LCDR Kuebler e-mail of 31 March 2008 (Attachment C). As of the date of this motion, the defense has received no response.

6. Discussion:

a. The M.C.A., R.M.C. and Regulation for Trial by Military Commission Require Production of the Requested Documents

(i) The Military Commission Act (“M.C.A.”) states that “Defense counsel in a military commission under this chapter shall have a reasonable opportunity to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense.” *See* 10 U.S.C. § 949j. The Regulation echoes the statute. *See* Regulation for Trial by Military Commissions 17-2(a) (“Pursuant to 10 U.S.C. § 949j, the defense counsel in a military commission shall have a reasonable opportunity to obtain witnesses and other evidence as provided by R.M.C. 701-703, and Mil. Comm. R. Evid. 505.”).

(ii) Moreover, Rule for Military Commission 701 requires the government to permit the defense to examine documents and things “within the possession, custody, or control of the Government, the existence of which is known or by the exercise of due diligence may become known to trial counsel, and *which are material to the preparation of the defense* or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial.” R.M.C. 701(c)(1) (emphasis added).¹

¹ The Discussion accompanying R.M.C. 701(c) instructs the military commission judges to look to *United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989), which applied Federal Rule of Criminal Procedure 16 addressing discovery, for the proper materiality standard. In *Yunis*, the court ruled that the defendant was entitled to “information [that] is at least ‘helpful to the defense of [the] accused.’” *Id.* at 623 (quoting *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957)); *see also* *United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1993) (“materiality standard is not a heavy burden”) (internal quotations omitted); *United States v. Gaddis*, 877 F.2d 605, 611 (7th Cir. 1989) (defining material evidence as evidence that would “significantly help [] in ‘uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment and rebuttal’”) (quoting *United States v. Felt*, 491 F.Supp. 179, 186 (D.D.C. 1979)). Thus, the materiality standard set forth in R.M.C. 701(c) requires the prosecution to turn over any information that is “at least helpful to the defense.”

(iii) The Requested Documents Are Material To the Preparation of the Defense

(1) Mr. Khadr has made a number of allegations concerning his treatment while a detainee at JTF-GTMO. *See* Khadr Aff. of 22 Feb 08 (Attachment H to D-027). These include not only general allegations of abuse and mistreatment, contemporaneous reporting of which may be evidenced in DIMS, but allegations of movement to less favorable conditions of confinement and/or loss of privileges as a result of failing to cooperate with interrogators. *See, e.g., id.* ¶ 50. As the reliability of Mr. Khadr's statements, both before and after arriving at JTF-GTMO, is likely to be a key issue at trial, information confirming Mr. Khadr's claims that he was, in essence, punished for departing from statements previously made while detained at Bagram would be highly probative to the factual issues to be decided by the members.² For instance, Mr. Khadr claims that after he told Canadian (and American) interrogators in 2002 that statements he had made at Bagram were untrue, "life got much worse for" him. *See id.* In 2003, after a visit by Canadians, Mr. Khadr contends that his security level was changed from "Level 1 to Level 4 minus, with isolation[.]" and that "everything was taken away from" him. *See id.* ¶ 50. If, as the defense believes, DIMS records detainee movements and administrative actions, then it may contain information to corroborate Mr. Khadr's allegations.

(2) Moreover, DIMS is likely to contain information showing when Mr. Khadr was moved for various purposes: e.g., interrogation or to receive medical treatment. It will thus provide the defense with a source of information that may lead to discovering evidence of interrogations undisclosed to the defense, or to information showing that Mr. Khadr was

² This is particularly important in light of the fact that available evidence shows that Mr. Khadr is reported to have made inculpatory statements to interrogators at Bagram that are demonstrably false. For instance, on 17 September 2002 (apparently after spending about a month and a half or so with military intelligence interrogators such as Sgt "C," Mr. Khadr is alleged to have told a CITF investigator that "just before he threw the grenade . . . the American was treating one of the Abdullah's for his injuries and was not engaging or threatening him in any way." *See* Agent's Investigation Report of 17 September 2002 (Attachment D). While consistent with the account of the firefight's conclusion promulgated by a DoD spokesman on 9 September 2002 before Mr. Khadr made inculpatory statements to this effect, Canadian Press, *Canada Denied Access to Teen in Afghanistan*, OTTAWA CITIZEN, Sept. 10, 2002 (Attachment C to D-033), this statement is patently inconsistent with known facts. Mr. Khadr's alleged statement suggests that he was *facing* his attackers when he allegedly threw a grenade, which is inconsistent not only with physical (and other) evidence indicating that he was shot in the back, but with the testimony of witnesses who say there was an ongoing firefight when a grenade was allegedly thrown. *See* [REDACTED] Report of Investigative Activity of [REDACTED] (Attachment B to [REDACTED] Reply Brief on D-022). The claim that he *saw* Sgt Speer is also inconsistent with evidence that Mr. Khadr was suffering from shrapnel injuries to both eyes and is so implausible that it even prompted skepticism from his interrogator, who noted "Clarify in a later interview, was he blinded or not? How did he know what the guy was doing[?]" Agent's Investigation Report of 17 Sept 02 (Attachment D). Finally, there is no evidence that Sgt Speer was acting as a medic or otherwise treating anyone.

interrogated while receiving medical treatment. Lastly, DIMS appears to be the best source for discovering general information about the conditions of Mr. Khadr's life since October 2002 and behavior while in U.S. custody. It may therefore contain the type of extenuation and mitigation evidence routinely introduced in the sentencing phase of courts-martial when the accused has spent a period of time in pretrial confinement.

(3) Despite this, the government has refused to produce the requested documents, citing the defense's failure to show how the requested documents are "material." The government apparently equates the term "material" with the term "exculpatory". The government's basis for denying the discovery request suggests that it believes it need not produce the requested documents unless they are exculpatory. To the contrary, documents relating to Mr. Khadr's treatment at JTF-GTMO are very material to the preparation of the defense. Therefore, this Commission should order the government to produce the requested documents.

b. Due Process, Notions of Fair Trial & the M.C.A. Require Production of the Requested Documents

(i) The notion of a fair trial encompasses the right of access to evidence. *See* M.C.A., 10 U.S.C. § 949j; R.M.C. 701; Fed. R. Crim. P. 16. Well-settled U.S. Supreme Court precedents interpreting our Constitution – made applicable by MCA § 949j(d)(2) – support production of evidence favorable to the accused where it is material to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *see also United States v. Bagley*, 473 U.S. 667, 675 (1985) (impeachment evidence falls within *Brady* rule); *United States v. Mahoney*, 58 M.J. 346, 349 (C.A.A.F. 2003) (same).

(ii) The MCA makes *Brady* applicable to military commissions, at least with respect to exculpatory evidence. *See* 10 U.S.C. § 949j(d)(2). Section 949j(d)(2) of the MCA states that the prosecution must disclose exculpatory evidence that it "would be required to disclose in a trial by general court-martial." *Brady* governs disclosure of exculpatory evidence in general courts-martial. *Mahoney*, 58 M.J. at 349. Therefore, by virtue of MCA § 949j(d)(2), *Brady* applies to military commissions.

c. International Law Requires Production of the Requested Documents

(i) The M.C.A. and the Manual for Military Commissions (M.M.C.) incorporate the judicial safeguards of Common Article 3 of the Geneva Conventions. *See* 10 U.S.C. § 948(b)(f) ("A military commission established under this chapter is a regularly constituted court, affording all the necessary 'judicial guarantees which are recognized as indispensable by civilized peoples' for purposes of Common Article 3 of the Geneva Conventions.")³; R.M.C., Preamble (stating

³ Whether military commissions, in fact, comply with Common Article 3 is ultimately a judicial question that Congress does not have the power to answer. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the *judicial department* to say what the law is.") (emphasis added). Any congressional attempt to legislative an answer to such a judicial question violates the bedrock separation of powers principle and has no legal effect. *See id.* at 176-77 ("The powers of the legislature are defined and limited; and that those

that the Manual for Military Commissions “provides procedural and evidentiary rules that [. . .] extend to the accused all the ‘necessary judicial guarantees’ as required by Common Article 3.” They must, therefore, be read in light of Common Article 3 and international law surrounding that provision.

(ii) The Geneva Convention Relative to the Treatment of Prisoners of War prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” See Geneva Convention, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, Common Article 3. The judicial safeguards required by Common Article 3 are delineated in article 75 of Protocol I to the Geneva Conventions of 1949.⁴ Article 75(a) provides that the procedures for trial “shall afford the accused before and during his trial all necessary rights and means of defense.”⁵

(iii) Read in light of international law principles, precedents applying the U.S. Constitution, and the rules governing this Commission, the government’s refusal to produce the requested documents ignores fundamental concepts of fairness and places in question the integrity of these proceedings.

limits may not be mistaken, or forgotten, the constitution is written.”). Because a statute should be construed to avoid constitutional problems unless doing so would be “plainly contrary” to the intent of the legislature, *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); see also *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936), the only reasonable interpretation is that § 948b(f) is that it requires military commissions to comply with Common Article 3.

⁴ See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 75, 1125 U.N.T.S. 3, *entered into force* Dec. 7, 1978 [hereinafter Additional Protocol]. The Protocol has not been ratified by the United States, but the U.S. government has acknowledged that Article 75 is customary international law. See *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2797 (2006) (stating that the government “regard[s] the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled”). See also Memorandum from W. Hays Parks, Chief, International Law Branch, DAJA-IA, et. al., to Mr. John H. McNeill, Assistant General Counsel (International), OSD (8 May 1986) (stating art. 75 of Additional Protocol I is customary international law). The Supreme Court has also relied on the Additional Protocol in construing the meaning of Common Article 3 of the Geneva Conventions as applied to military commissions. See *Hamdan*, 126 S.Ct. at 2796.

⁵ The ICTY and the ICTR similarly provide “minimum guarantees” for the accused to “be entitled to a fair and . . . hearing.” Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, art. 21(2), U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), *adopted by* Security Council 25 May 1993, U.N. Doc. S/RES/827 (1993); Statute of the International Tribunal for Rwanda, art. 20(2), *adopted by* S.C. Res. 955, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598, 1600 (1994).

d. Conclusion

(i) The integrity of these proceedings will be fatally undermined if the defense is denied access to evidence within the control of the government that is relevant to Mr. Khadr's treatment at JTF-GTMO. *See United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987) ("[I]nvestigation is an essential component of the adversary process."). The requested documents are material to the defense's ability to prepare for trial by, *inter alia*, allowing the defense to develop evidence enabling the members to adequately assess the reliability of statements Mr. Khadr is alleged to have made at JTF-GTMO. The Commission should therefore order the government to produce all statements of Mr. Khadr.

7. **Oral Argument:** The defense requests oral argument as it is entitled to pursuant to R.M.C. 905(h), which provides that "Upon request, either party is entitled to an R.M.C. 803 session to present oral argument or have evidentiary hearing concerning the disposition of written motions." Oral argument will allow for thorough consideration of the issues raised by this motion.

8. **Witnesses & Evidence:** The defense does not anticipate the need to call witnesses in connection with this motion. The defense relies on the following documents as evidence in support of this motion:

Attachments A – D

Defense Supplemental Request for Discovery, 5 March 2008 (Attachment A to D-041)

Government Response to Defense Supplemental Request for Discovery, 20 March 2008 (Attachment B to D-041)

Khadr Aff. of 22 Feb 08 (Attachment H to D-027)

Canadian Press, *Canada Denied Access to Teen in Afghanistan*, OTTAWA CITIZEN, Sept. 10, 2002 (Attachment C to D-033)


██████ Report of Investigative Activity of 17 Mar 04, ██████ (Attachment B to Defense Reply Brief on D-022)

9. **Conference:** The defense has conferred with the prosecution regarding the requested relief. The government objects to the requested relief.

10. **Additional Information:** In making this motion, or any other motion, Mr. Khadr does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this Military Commission to charge him, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in and all appropriate forms.

11. Attachments

- A. [REDACTED] e-mail thread of 3 March 2008
- B. CPT Keith Petty e-mail thread of 1 April 2008
- C. LCDR Kuebler e-mail of 31 March 2008
- D. Agent's Investigation Report of 17 September 2002

A handwritten signature in black ink, appearing to read "William Kuebler".

William Kuebler
LCDR, USN
Detailed Defense Counsel

Rebecca S. Snyder
Assistant Detailed Defense Counsel

Monday, March 03, 2008 10:33 AM
Kuebler, William, LCDR, DoD OGC
Snyder, Rebecca, Ms, DoD OGC; [REDACTED]
RE: Discovery matters ICO U.S. v. Khadr

██████ such requests should be sent through the prosecutor's office. I have forwarded your email to the prosecution for their action.

U.S. v. Khadr

Sir,

We are in the process of formulating supplemental discovery requests in the above-referenced case and were interested in seeking to access records relating to our client's detention at JTF-GTMO. I understand that there is a system called the Detainee Information Management System (DIMS), which would contain a number of potentially relevant items. In order to "streamline" and provide greater specificity to our request(s), it would be helpful to speak with someone familiar with the system and the records it contains. Would you be able to provide us with a point of contact at JDG who would speak with us concerning the system and matters therein relating to our client? Thank you.

 V/R

LCDR Kuebler

From: Petty, Keith, CPT, DoD OGC
Sent: Tuesday, April 01, 2008 11:26 AM
To: [REDACTED]
Cc: [REDACTED]
Subject: RE: DIMS Explanation

Bill,

I will pass on your RFI to JTF-GTMO, and hope to have a response quickly.

Per your comments in the last paragraph. There is no chance, none, that forwarding requests through the TC "unreasonably impedes" your access to information. This is standard practice in courts-martials, and is the practice ordered by the Judge in this case.

If you disagree with the above statement, I look forward to responding to your motion.

V/r,

Keith A. Petty
Captain, U.S. Army
[REDACTED]

From: [REDACTED]
Sent: Tuesday, April 01, 2008 11:19 AM
To: [REDACTED]
Subject: RE: DIMS Explanation

Thanks, Keith.

Some specific questions --

- (1) Can information be retrieved by name or ISN (i.e., individual identifying criteria)?
- (2) Does it record movements for purpose of interrogation?
- (3) Does it record complaints (of abuse, mistreatment or otherwise)?
- (4) Does it record movement between camps?

- (5) Does it track by certain fields or categories, or chronologically (or both)?
- (6) If by field or category, what are they?
- (7) Are records printable?
- (8) If so, how big (i.e., how many pages or documents) would the information relating to 766 be?
- (9) Is there classified information recorded in DIMS?
- (10) Is there a difference between "DIMS" and "JDIMS"?
- (11) If so, what is it?
- (12) Are there other files or records (aside from DIMS) maintained by JTF-GTMO that are specific to detainees or from which information can be retrieved using individual identifying criteria?
- (13) Does DIMS record changes in status (e.g., compliant to non-compliant, between different "levels")?
- (14) Does it record adjustments or changes in privileges -- e.g., whether certain personal items are given or taken away from a detainee?

We have concerns that a JTF "policy" requiring all "requests for information" to be submitted in writing and routed through the TC has the practical effect of unreasonably impeding defense access to witnesses and evidence (see RMC 701(j)), but are anxious to move things forward as quickly as possible and will give this approach a try (for now). In the meantime, we would like to see (and ask that you consider this a formal request for) copies of any policy or directive relating to defense "requests for information" or "RFIs" from JTF-GTMO -- specifically, the policy referenced in [REDACTED] e-mail below.

Thanks again.

R/Bill

From: Petty, Keith, CPT, DoD OGC
Sent: Tuesday, April 01, 2008 10:23 AM
To: Kuebler, William, LCDR, DoD OGC; [REDACTED]
[REDACTED]

Subject: DIMS Explanation

Bill/Rebecca,

Please see the message below from [REDACTED] JTF GTMO legal. Please let us know if you have further questions about the DIMS process, and if this helps you tailor your search request of this system. Any further questions or requests about DIMS should go through me. I will then forward your written requests to JTF GTMO.

The message follows:

CPT Petty,

The Detainee Information Management System or DIMS allows camp personnel to store information on a variety of activities in the camps.

Information may be reported by cellblock and includes number of detainees assigned, number present, and if medical personnel or other visitors have been on the block or are scheduled to be on the block.

The system also tracks detainee discipline, refusals, and requests, e.g., if detainee refuses a meal, a shower or medication, and can include requests to see people such as Red Cross representatives. DIMS also keeps track of significant activities and noteworthy events in each cellblock. Cell maintenance issues are also recorded in DIMS.

DIMS is a tool for camp management and the information in the system is often condensed, noting only the highlights of given events.

Information in DIMS is entered by personnel assigned to the cell blocks, including guards, supervisors, and others and is not intended to be a comprehensive means of documenting activities in the camps. While every effort is made to keep DIMS up to date and accurate, no one in the JTF could certify that information in DIMS is complete or accurate.

I am the JTF-GTMO POC for this matter and am standing by to assist. As is JTF-GTMO policy for Commissions RFIs, please have defense submit their requests in writing via TC. Hope this helps.

Pls note, [REDACTED] is the Head of Military Justice and referred this matter to me yesterday.

Thanks,

[REDACTED]

[REDACTED]

JTF-GTMO/SJA

Guantanamo Bay, CUBA

[REDACTED]

Keith A. Petty
Captain, U.S. Army
Prosecutor

[REDACTED]

From: Kuebler, William, LCDR, DoD OGC
Sent: Monday, March 31, 2008 2:42 PM
To: [REDACTED]
Subject: DIMS

Jeff/Keith,

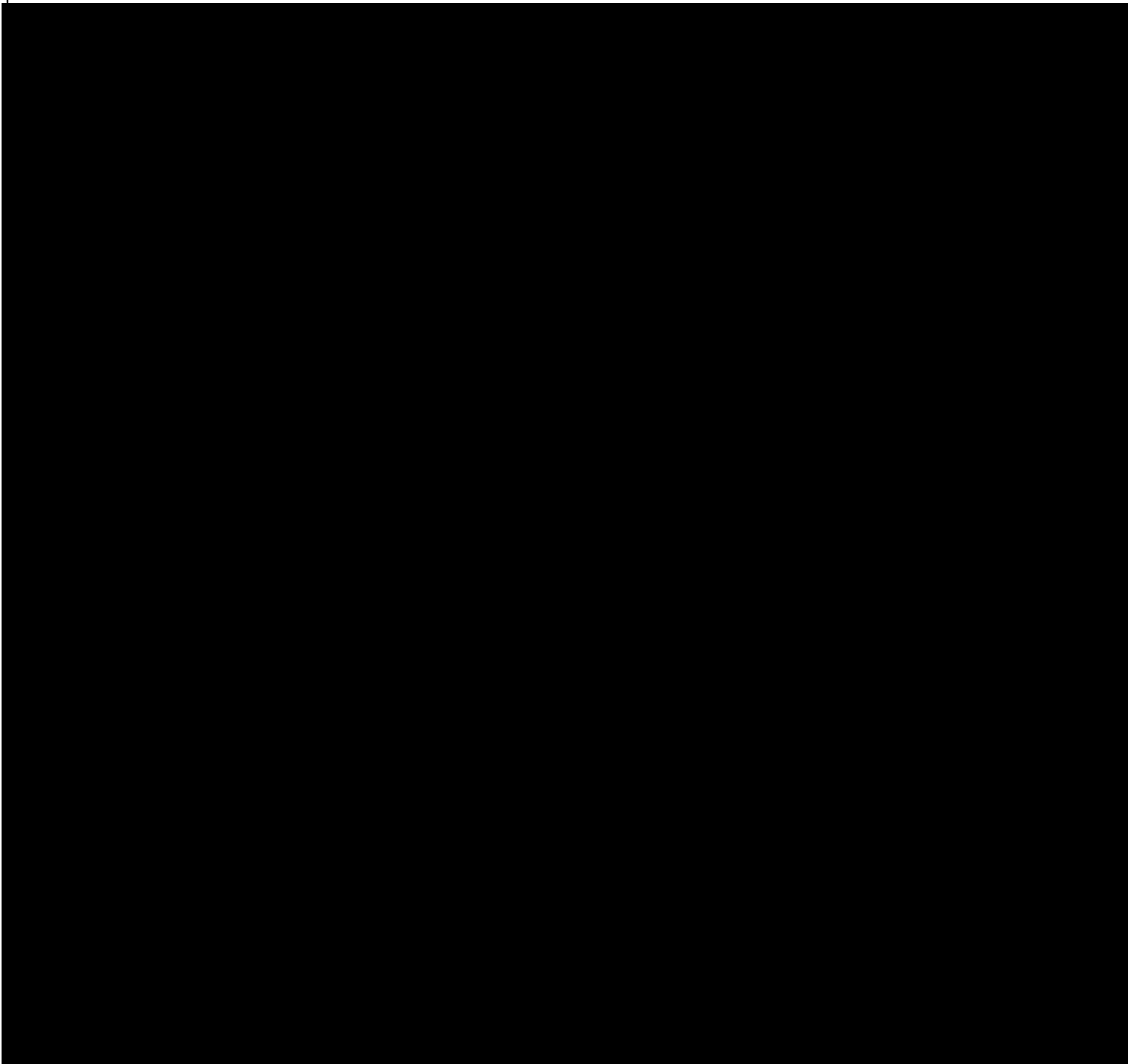
Per JTF's direction, would you all be willing to provide us with a POC at JTF to discuss the content of the DIMS, so that we can either (a) resolve the discovery issue or (b) issue a more narrowly-tailored request or motion? Thanks.

V/R

Bill

AGENT'S INVESTIGATION REPORT CID Regulation 195-1	ROI NUMBER [REDACTED]
	17 SEP

DETAILS



TYPED AGENT'S NAME AND SEQUENCE NUMBER [REDACTED]	ORGANIZATION 38 th MP Det (CID), (DSE), (Hvy), Kandahar Airfield, Afghanistan
SIGNATURE	DATE [REDACTED]
	EXHIBIT

[REDACTED]

From: Petty, Keith, CPT, DoD OGC
Sent: Wednesday, April 30, 2008 12:30 PM
To: [REDACTED]

Subject: RE: U.S. v. Khadr -- Special Request for Relief (DIMS materials)

Sir,

The following are the Military Judge's questions regarding DIMS materials followed by the Government's response:

1. Government, please advise the court concerning the source of the restrictions placed on copying the materials from the Detainee Information Management System.

a. Joint Task Force - Guantanamo Bay, Cuba, (JTF-GTMO) has provided the restrictions in question on defense review of DIMS materials.

b. The records in DIMS contain the names of JTF personnel and former JTF personnel, including guard staff that have been threatened by detainees. The JTF finds this information to be protected, and does not agree to disclosure to the Defense and the accused.

c. JTF GTMO will allow the Defense to review the materials, mark the pages or materials that they feel are relevant, and then have the Government, or JTF, redact those materials. After redacting the names JTF feels are protected, the Defense will then be provided a copy. Redactions will generally be limited to the names of JTF staff that are identified in the records. JTF is prepared to allow the Defense to inquire about particular JTF staff, so long as they can articulate a sufficient justification and measures are in place to protect this information from further release or improper use.

2. Government, please determine from the source of the restriction the reasons why copies of the materials can not be made for defense counsel.

Further, please determine if a variation of a "copy and destroy after review" policy would satisfy whatever needs are served by the no copy policy.

a. For the reasons stated above, JTF GTMO is not amenable to a "copy and destroy after review" policy.

3. Government, please determine if there are spaces in the Prosecution Office which can be used for defense counsel review of materials - not just the materials in question.

a. There are spaces in the Prosecution office which defense counsel can use to review materials. The only reason the Defense did not have more privacy last week was due to a meeting being held in the Prosecution conference room. With sufficient advance notice, there are other conference rooms available to reserve for Defense use if the OMC-P conference room is not available.

4. The commission advises both parties that it will be quite willing to require the parties to repair to Guantanamo if necessary to move discovery along.

a. Hopefully, the Defense is nearing completion of review of the documents in question. The Prosecution advised the Defense to let us know when they want to complete the review. The documents have been available for their review this entire week. As of 1200hrs today, the Defense has not contacted us requesting any additional review.

b. The Prosecution has ample office space available for the Defense to review documents at GTMO. In the event the Defense has not completed their review prior to departing GTMO following next week's session, the Prosecution requests the Military Judge order the Defense to complete their review prior to leaving Guantanamo Bay.

V/r,

Keith A. Petty
U.S. Army

[REDACTED]

[REDACTED]

[REDACTED]

1 Request for Relief (DIMS materials)

COL Brownback has directed that I send the email below to counsel and other interested persons.

v/r,

[REDACTED]

Military Commissions Trial Judiciary

[REDACTED]

materials) t for Relief (DIMS

LTC [REDACTED]

Please forward the email below to counsel in the case of United States v. Khadr and to other interested persons.

COL Brownback

1. Government, please advise the court concerning the source of the restrictions placed on copying the materials from the Detainee Information Management System.
2. Government, please determine from the source of the restriction the reasons why copies of the materials can not be made for defense counsel.
Further, please determine if a variation of a "copy and destroy after review" policy would satisfy whatever needs are served by the no copy policy.
3. Government, please determine if there are spaces in the Prosecution Office which can be used for defense counsel review of materials - not just the materials in question.
4. The commission advises both parties that it will be quite willing to require the parties to repair to Guantanamo if necessary to move discovery along.

[REDACTED]

[REDACTED]ief (DIMS materials)

1. The defense previously filed a motion to compel production of records relating to Mr. Khadr contained in the Detainee Information Management System (DIMS) (D-043). The prosecution agreed to provide matters in response to the defense request.

2. The DIMS records are classified "secret" and prosecution has provided access, subject to the condition (ostensibly imposed by JTF-GTMO) that the defense view the records in the OMC-P spaces in Crystal City and not be allowed to take copies back to the OMC-D offices. Moreover, the prosecution indicated (again, apparently at the insistence of JTF-GTMO) that any notes defense counsel made upon review of the records would have to be classified "secret," left with the prosecution, and transported to GTMO for declassification review by JTF personnel in connection with the next session of the commission. Defense counsel reviewed the DIMS records contained in two large binders and a couple of file folders, consisting of hundreds of pages, at the OMC-P offices on 24 Apr 08. Although the prosecution attempted to accommodate defense counsel as much as possible, due to logistical constraints, defense counsel were required to review the documents in a space occupied by OMC-P personnel and thus unable to freely discuss the DIMS materials without compromising work-product or attorney-client matters.

3. As the records are classified, the defense cannot go into any degree of detail about the contents of the records. However, based on our preliminary review, the DIMS records appear to contain a great deal of information relevant to the issues referenced in the defense motion. Given the need to access, discuss, capture, and cross-reference matters contained in the DIMS records with other discovery materials in the possession of the defense, it is simply

impracticable to do so given the constraints imposed by the JTF. Accordingly, the defense respectfully requests that the Military Judge order production of copies of these materials to the defense.

4. The defense wishes to point out that it is not accusing or blaming the prosecution for anything in connection with this matter. This appears to be the latest in a series of issues arising from JTF-GTMO's belief that it can condition and limit access to JTF witnesses and evidence in a manner over and above that contemplated by the MMC. However, the defense does wish to note that there are currently a number of discovery items to which it is being provided access under the condition that it review matters at the OMC-P spaces, rather than being provided copies to take to its offices in Washington, DC. Such practices can only serve to hinder defense preparation and slow down the process of discovery in this case.

5. The defense has conferred with the prosecution in this matter and expects the prosecution to oppose the requested relief.

V/R

LCDR Kuebler

[REDACTED]

From: [REDACTED]

Friday, May 09, 2008 5:41 PM

To: [REDACTED]
[REDACTED]

Subject:

US v Khadr - Ruling - D-043 (Defense Motion to Compel Production of Documents (DIMS))

Attachments:

D-043 Ruling - Khadr.pdf

[REDACTED]
D-043 Ruling -
Khadr.pdf (20 K...

COL Brownback has directed that I forward the attached materials to counsel in US v Khadr and to other interested persons.

V/r,

[REDACTED]

[REDACTED]

[REDACTED],

Please forward the attached ruling in D-043 to the parties in the case of United States v. Khadr. Please furnish a copy to other interested persons.

COL Brownback

2008-04-07 Def
MTC (DIMS).pdf ...

All parties,

The filing designation for the 6 April 08 Defense Motion to Compel Production of Documents (from Detainee Information Management System) is D-043 Motion to Compel Production (DIMS) - Khadr. All future communications - whether in hard copy or by email - concerning this motion will use the filing designation as a reference in addition to the name of the filing. See RC 5.3:

3. Filing designation and future communications or filings.

a. Once a filing designation has been assigned, all future communications - whether in hard copy or by email - concerning that series of filings will use the filing designation as a reference in addition to the name of the filing. This includes adding the initial file designations to the style of all filings, the subject lines of emails, and the file names to ALL email attachments. Examples:

* An email subject line forwarding a response to P2 in US v Jones should read: "P2 Jones - Defense Response - Motion to Exclude Statements of Mr. Smith." The filename of the filings shall be the same as the response being sent.

* The filename of a document that is an attachment to the response should read: "P2 Jones - Defense Response - Motion to Exclude Statements of Mr. Smith - attachment - CV of Dr Smith."

 $v/r,$

Military Commissions Trial Judiciary
Department of Defense

[REDACTED]

[REDACTED]

Subject: US v. Khadr, Defense Motion to Compel Production of Documents (DIMS)

LtCol [REDACTED]

The defense motion to compel production of documents from the Detainee Information Management System is attached.

V/r
Ms. Snyder

Rebecca S. Snyder
Attorney

[REDACTED]

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**UNITED STATES
OF
AMERICA**

**D-048
Defense Notice of Motion To Compel Production of
the JTF GTMO SERE Interrogation SOP dated 10
December 2002**

9 May 2008

v

OMAR AHMED KHADR
a/k/a "Akhbar Farhad"
a/k/a "Akhbar Farnad"
a/k/a "Ahmed Muhammed Khahi"

Ruling

1. The defense filed this notice of motion on 9 April 2008. The military judge has not at any time required that the defense provide a motion as contemplated by the Rules of Court. The government filed a response on 21 April. The defense submitted additional documents for consideration on 6 May. Both parties argued the matter on 8 May.
2. The commission finds that JTF GTMO has never officially adopted a SERE Interrogation SOP. The commission further finds that a draft SERE SOP of some sort was produced and that the government has a copy thereof.
3. The commission, based on the totality of the circumstances and taking into account its knowledge of the ways of the world in general and military units in specific, finds that even if such SOP were never issued officially, it is more likely than not that personnel of JTF GTMO were aware of the documents and discussed the relevant methods contained therein.
4. The commission finds that the government has asserted no overwhelming interest in not producing the document. The commission finds that the document is material to the preparation of the defense case in general, and it finds that the document is material specifically to the preparation of any defense motion to suppress statements allegedly made by Mr. Khadr while detained by JTF GTMO.
5. The defense motion is granted. The government shall provide a copy of the draft JTF GTMO SERE Interrogation SOP to the defense.

Peter E. Brownback III
COL, JA, USA
Military Judge

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

**Notice of Defense Motion
To Compel Production of the
JTF GTMO SERE Interrogation SOP
dated 10 December 2002**

9 April 2008

1. **Timeliness:** This notice of motion is filed within the timeframe established by the Military Judge's 15 March 2008 e-mail order.
2. **Notice of motion:** On or about 10 April 2008, the defense shall move this Military Commission for an order directing the government to produce the Joint Task Force GTMO SERE Interrogation Standard Operating Procedures dated 10 December 2002 referenced in a 17 December 2002 Department of Defense Memorandum for JTF-GTMO/J2 (Attachment A).
3. **Summary of basis for motion:** Since the government's case against Mr. Khadr is based largely on statements allegedly made in the course of interrogation, the reliability of the information obtained by use of techniques employed in those interrogations is at issue. Mr. Khadr has been detained for nearly six years and subjected to repeated interrogations. Knowledge of the techniques employed is essential to a determination of the reliability of Mr. Khadr's statements. The defense requested this information on 9 November 2007. (Def. Discovery Req. of 9 Nov 07, ¶ 3(m) (Attachment D to D-025 Def. Mot. to Compel Discovery (Eyewitnesses).) On 12 March 2008, the military judge directed the government to locate interrogation SOPs and interrogation manuals applicable to interrogators who interrogated Mr. Khadr. (R. at 223.) To assist the government in its search for interrogation SOPs and manuals, the defense requested production of the JTF GTMO SERE Interrogation SOP dated 10 December 2002. Email from R. Snyder dated 6 Apr 08 (Attachment B). (The SOP is dated less than two months after Mr. Khadr arrived at GTMO.) While the government has produced some SOPs and manuals in response to the military judge's order to search for them, on 8 April 2008, it notified the defense that it objected to the production of the JTF GTMO SERE Interrogation SOP without providing a reason for the refusal.
4. **Oral Argument:** The Defense requests oral argument as it is entitled to pursuant to R.M.C. 905(h) ("Upon request, either party is entitled to an R.M.C. 803 session to present oral argument or have evidentiary hearing concerning the disposition of written motions."). Oral argument will allow for a thorough consideration of the issues.
5. **Witnesses and evidence:** The defense does not anticipate the need to call witnesses in connection with this motion, but reserves the right to do so should the prosecution's response raise issues requiring rebuttal testimony. The defense relies on the following as evidence:

Attachments A-B

6. **Certificate of conference:** The defense and prosecution have conferred. The prosecution objects to the relief requested.

7. **Additional Information:** In making this motion, or any other motion, Mr. Khadr does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this Military Commission to charge him, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in and all appropriate forms.

8. **Attachments:**

- A. 17 December 2002 Department of Defense Memorandum for JTF-GTMO/J2
- B. Email from R. Snyder dated 6 Apr 08

/s/

William C. Kuebler
LCDR, JAGC, USN
Detailed Defense Counsel

Rebecca S. Snyder
Assistant Detailed Defense Counsel



DEPARTMENT OF DEFENSE
CRIMINAL INVESTIGATION TASK FORCE (DEPLOYED)
GUANTANAMO BAY, CUBA

REPLY TO
ATTENTION OF

CITF-G/SAC

17 Dec 02

MEMORANDUM FOR JTF-GTMO/J2

SUBJECT: JTF GTMO "SERE" INTERROGATION SOP DTD 10 DEC 02

1. On 14 December 02, prior the "Decision Making" brief with the CG, you provided me a copy of JTF GTMO SERE INTERROGATION SOP dated 10 Dec 02 and asked me to review it and provide you my opinion. [REDACTED]

[REDACTED] However, I do want to reiterate CITF-G's general position on this matter. As outlined in our memorandum for JTF GTMO dated 15 Nov 02, CITF-G [REDACTED]

[REDACTED] While the subject SOP clearly does not apply to LEA (CITF and FBI) interrogators (applicable only to military and civilian interrogators assigned to JTF-GTMO), LEA in conjunction with the FBI's Behavioral Analysis Unit want to provide you the following general observations on [REDACTED]

2. General Observations: Both the military and LEA share the identical mission of obtaining intelligence in order to prevent future attacks on Americans. However, LEA has the additional responsibility of seeking reliable information/evidence from detainees to be used in subsequent legal proceedings.

3. [REDACTED]

4. The SERE methods were designed for use in a battlefield environment as a means of collecting tactical intelligence (e.g., to uncover enemy plans, determine enemy strength, movement, weapon capabilities and logistical support, etc.) [REDACTED]

5. LEA agents are responsible for investigating a wide variety of criminal and counterintelligence matters around the world. Accordingly, they are highly trained and experienced in eliciting information from reluctant subjects of diverse cultural and socioeconomic backgrounds. [REDACTED]

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7. Utilizing rapport-based methods, LEA have realized numerous successes during several major terrorism investigations including the bombings of embassies in East Africa, the bombing of the USS Cole and the 1993 World Trade Center bombing. Like most of the GTMO detainees, the perpetrators of these terrorist acts were motivated by a distorted religious doctrine and reinforced by a group/cultural dynamic.

8.

Page 2 of 3

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[REDACTED]

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14.

[REDACTED]

b(7)(D)-1

[REDACTED]

Copy:

[REDACTED]

1320

[REDACTED]

Dec 02

of 10

Good evening,

To assist you in your search for SOPs and Interrogation Manuals, I understand that there is a JTF GTMO SERE Interrogation SOP dated 10 December 2002. Please let us know if you will produce this.

Thanks,
Rebecca

Rebecca S. Snyder
Attorney

[REDACTED]

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UNITED STATES OF AMERICA

v.

**OMAR AHMED KHADR
a/k/a “Akhbar Farhad”
a/k/a “Akhbar Farnad”
a/k/a “Ahmed Muhammed Khali”**

D048

GOVERNMENT’S RESPONSE

**To the Defense Notice of Motion
to Compel Production of the JTF GTMO
SERE Interrogation SOP dated 10 December
2002**

21 April 2008

1. Timeliness: This motion is filed within the timelines established by Military Commissions Trial Judiciary Rule of Court 3(6)(b) and the Military Judge’s e-mail of 14 April 2008.

2. Relief Requested:

a. The Government notes that the Defense has not formally motioned the Court to produce the documents referenced in their “Notice of Motion to Compel Production of the JTF GTMO SERE Interrogation SOP dated 10 December 2002.” In the event the Defense ultimately files such a motion on this issue, the Government respectfully requests the opportunity to respond.

b. Moreover, the Government respectfully requests that the Military Judge require the Defense to submit all motions for appropriate relief in writing as required by Military Commissions Trial Judiciary Rule of Court 3.3. RC 3.3 requires parties to file motions in writing unless they lack sufficient time to file a written motion. In the present case, the Defense has had ample time to file written motions regarding this specific discovery issue. Allowing parties to make such informal notices, as well as relying on incomplete arguments prepared without an appropriate amount of time will likely require the Military Judge to issue rulings while not being fully briefed on the relevant facts and law on a particular matter. All parties would benefit from following the formalized motions practice articulated in Rule 3 of the Rules of Court.

4. Burden and Persuasion: Assuming the Defense ultimately moves for the requested relief, as the moving party, the Defense would bear the burden of establishing, by a preponderance of the evidence, that it is entitled to the requested relief. See Rules for Military Commissions (“RMC”) 905(c)(1), 905(c)(2)(A).

5. Facts:

a. All relevant facts are contained in the discussion.

6. Discussion:

The Government conducted a search of JTF-GTMO and the Department of Defense for an SOP related to SERE interrogation techniques. After exercising due diligence, the Government concludes that there was no SOP of that nature in place at any time during which the accused was interrogated. Moreover, the Government was unable to locate any manual or other interrogation policy implemented that expressly incorporated the SERE techniques.

7. Oral Argument: The Defense request should be denied without argument.

8. Witnesses and Evidence: All of the evidence and testimony necessary to deny this motion is already in the record.

9. Certificate of Conference: Not applicable.

10. Additional Information: None.

//s//

Jeffrey D. Groharing
Major, U.S. Marine Corps
Prosecutor

Keith A. Petty
Captain, U.S. Army
Assistant Prosecutor

John F. Murphy
Assistant Prosecutor
Assistant U.S. Attorney

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AGENT'S INVESTIGATION REPORT

CID Regulation 195-1

ROI NUMBER

[Redacted Content]

TYPED AGENT'S NAME AND SEQUENCE NUMBER

ORGANIZATION

GRP (CID),

SIGNATURE

DATE

EXHIBIT

CID FORM 81

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SWORN STATEMENT

For use of this form, see AR 190-45: The proponent agency of the Deputy Chief of Staff for Personnel.

LOCATION [REDACTED]	DATE [REDACTED]	TIME [REDACTED]	FILE NUMBER [REDACTED]
LAST NAME FIRST NAME MIDDLE NAME [REDACTED]	SOCIAL SECURITY NUMBER [REDACTED]	GRADE/STATUS [REDACTED]	

ORGANIZATION OR ADDRESS

[REDACTED]

EXHIBIT	INITIALS OF PERSON MAKING STATEMENT [REDACTED]	PAGE [REDACTED] OF [REDACTED] PAGES
ADDITIONAL PAGES MUST CONTAIN THE HEADING "STATEMENT OF [REDACTED] TAKEN AT [REDACTED] DATED [REDACTED] CONTINUED." THE BOTTOM OF EACH ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT AND BE INITIALED AS "PAGE [REDACTED] OF [REDACTED] PAGES." WHEN ADDITIONAL PAGES ARE UTILIZED, THE BACK OF PAGE 1 WILL BE LINED OUT, AND THE STATEMENT WILL BE CONCLUDED ON THE REVERSE OF ANOTHER COPY OF THIS FORM		

DA FORM 2823 (AUTOMATED))

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~~96-018347~~

NO
NOT USED

AFFIDAVIT

_____ HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH
BEGINS ON PAGE 1 AND ENDS ON PAGE _____. I FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME.
THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED THE BOTTOM OF EACH PAGE CONTAINING
THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR WITHOUT FEAR OF
PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL

WITNESSES:

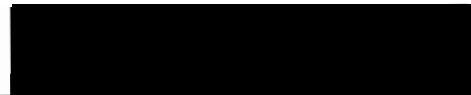
ORGANIZATION OR ADDRESS

ORGANIZATION OR ADDRESS

SUBSCRIBED AND SWORN BEFORE ME, A PERSON BY LAW
TO ADMINISTER OATHS, THIS _____ DAY OF _____ 19____
AT _____, VA

(Authority to Administer Oath)

INITIALS OF PERSON MAKING STATEMENT _____



AGENT'S INVESTIGATION REPORT

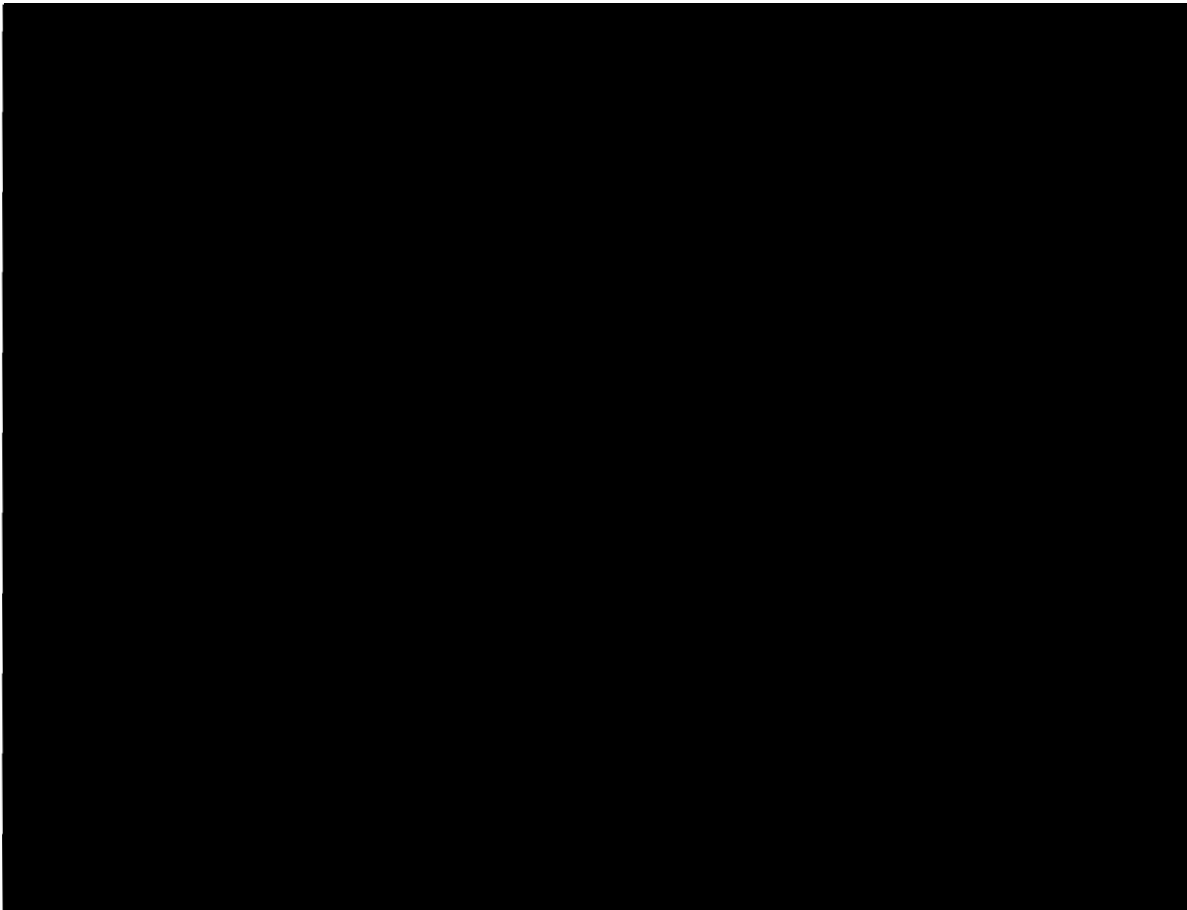
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CID Regulation 195-1

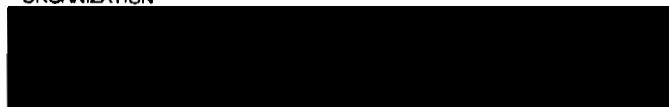
Page 1 of 1 Page(s)

DETAILS



TYPED AGENT'S NAME AND SEQUENCE NUMBER

ORGANIZATION



SIGNATURE

DATE

EXHIBIT



CID Form 94

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PROTECTIVE MARKING IS EXCLUDED FROM AUTOMATIC
TERMINATION UNDER THE PROVISIONS OF AR 340-18

SWORN STATEMENT

For use of this form, see AR 190-45; the proponent agency is ODCSOPS

PRIVACY ACT STATEMENT

AUTHORITY: Title 10 USC Section 301; Title 5 USC Section 2951; E.O. 9397 dated November 22, 1943 (SSN).
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(Signature of Person Administering Oath)

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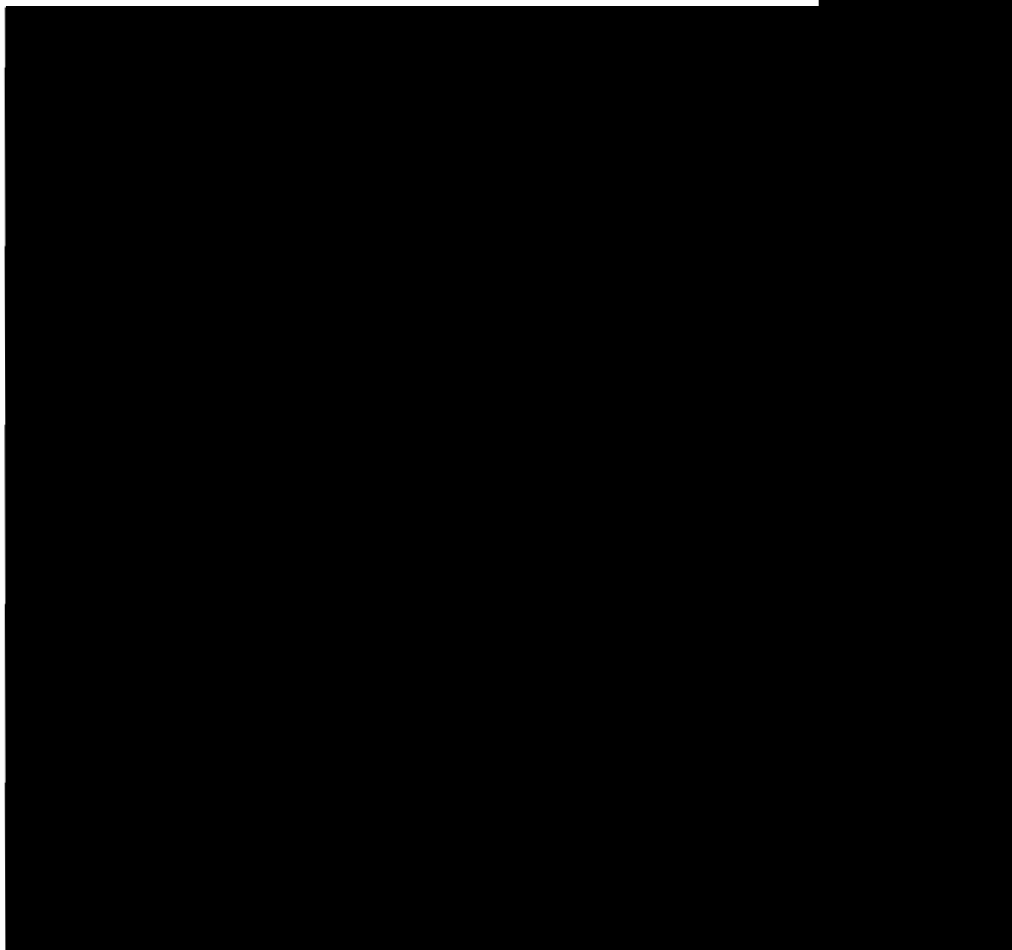
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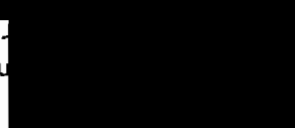
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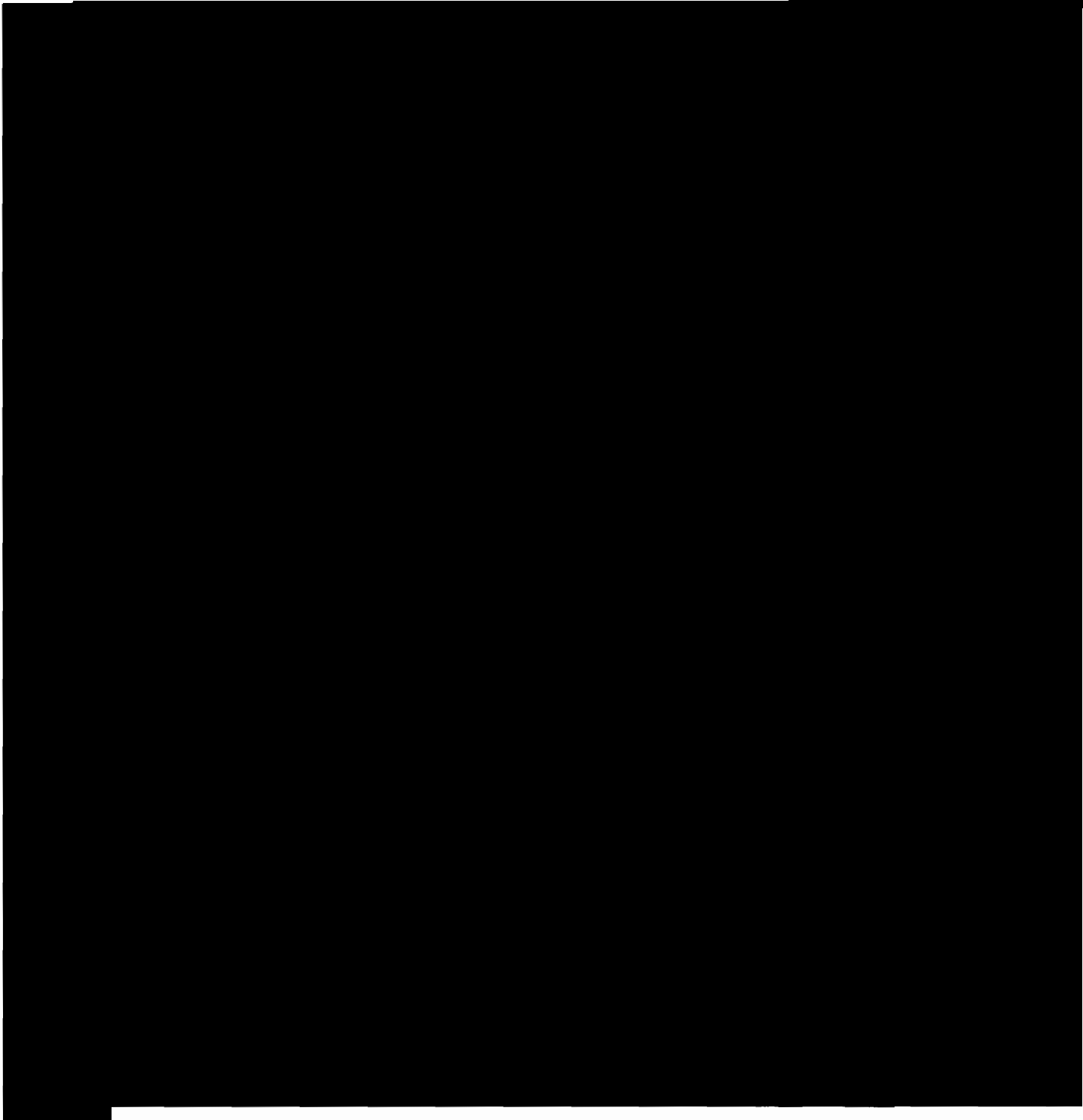
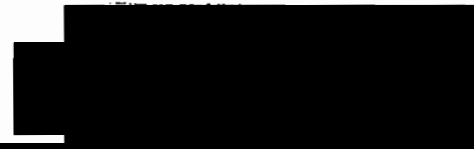
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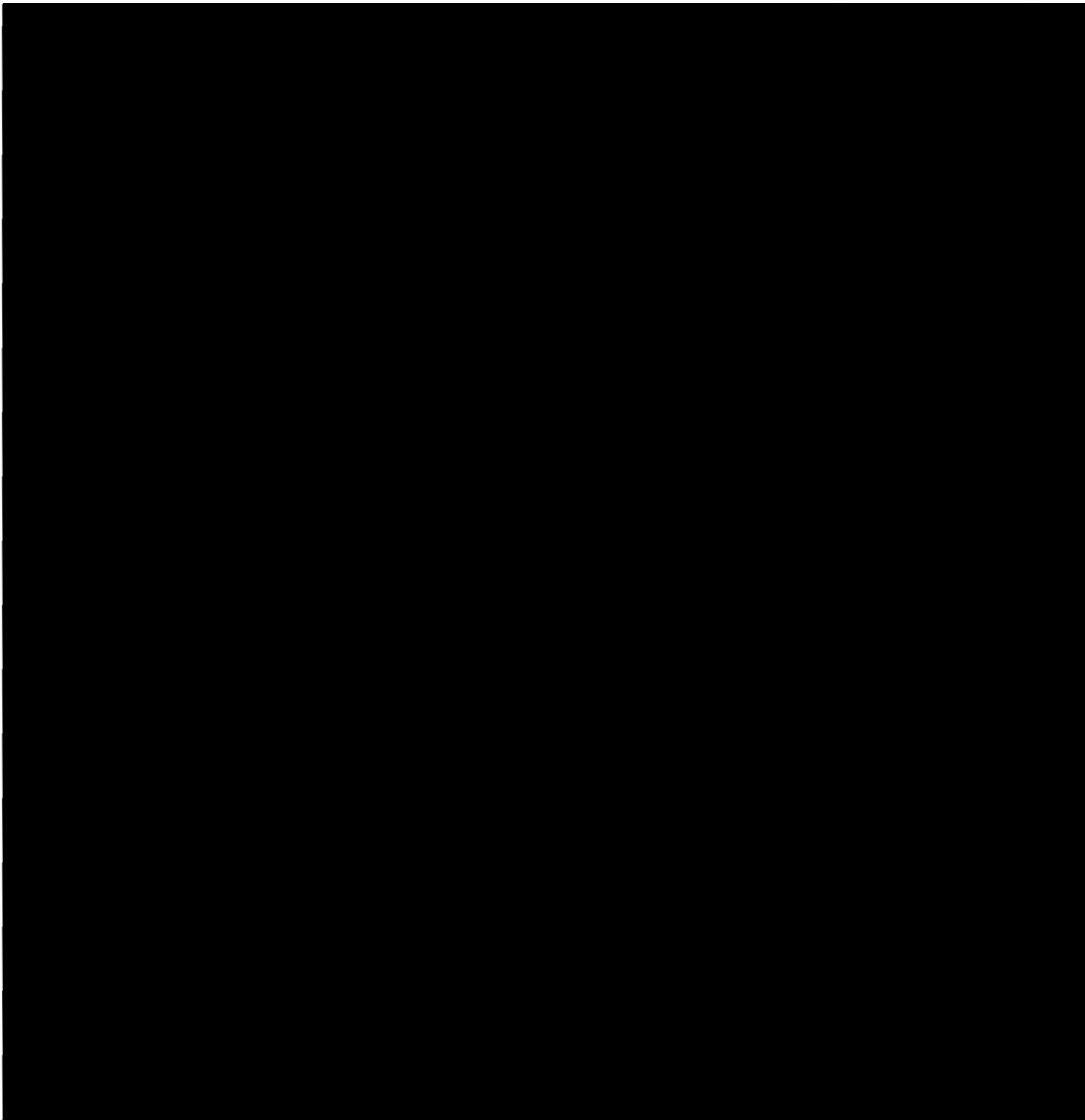
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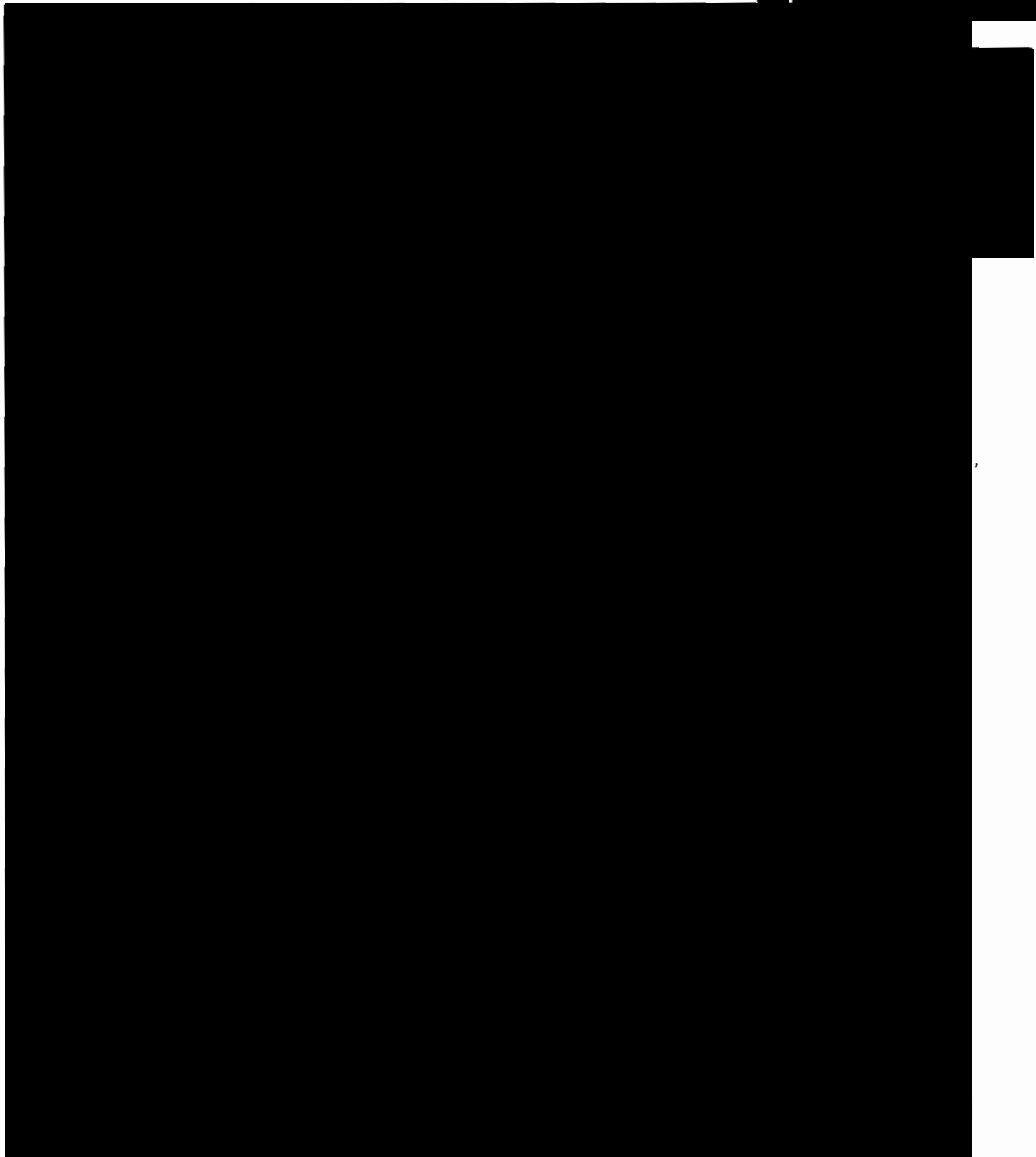
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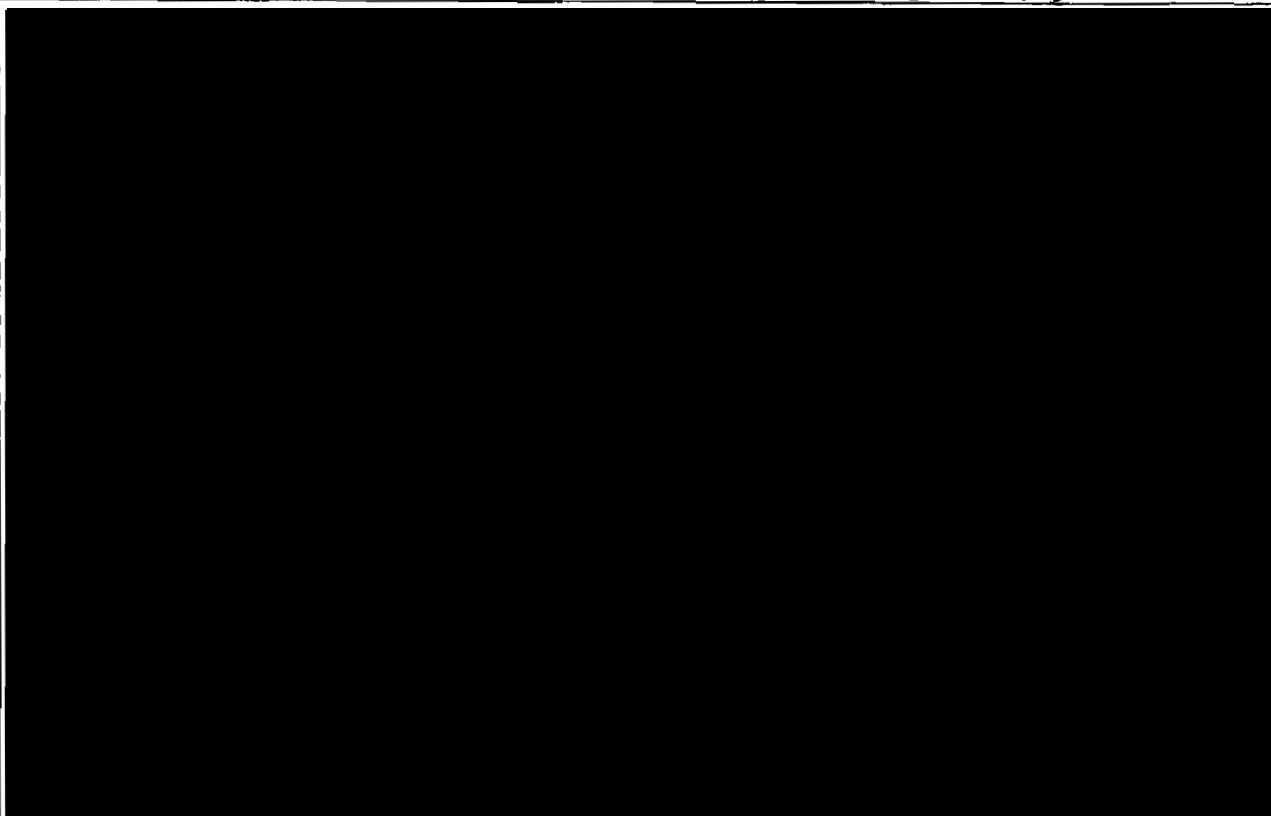
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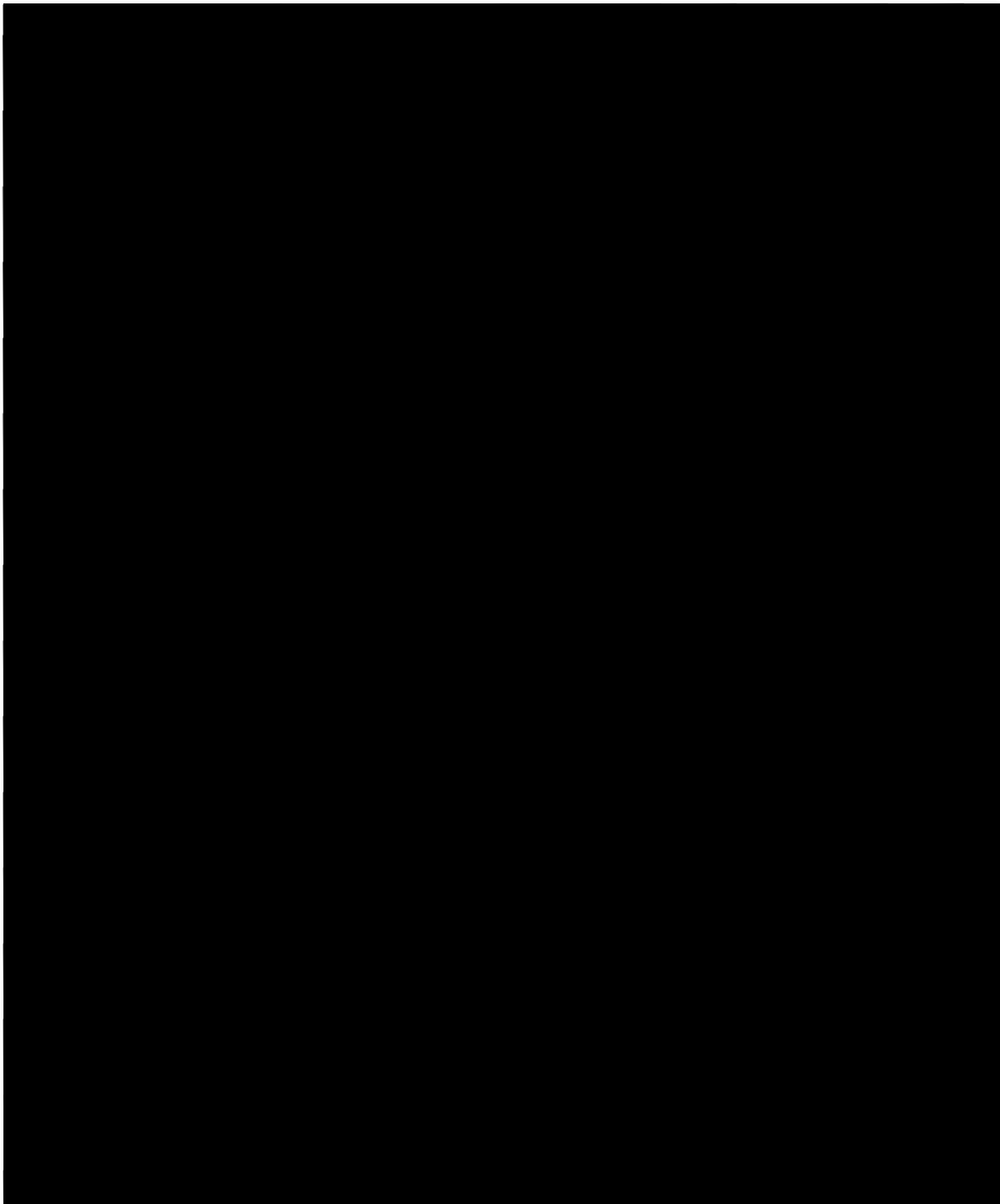
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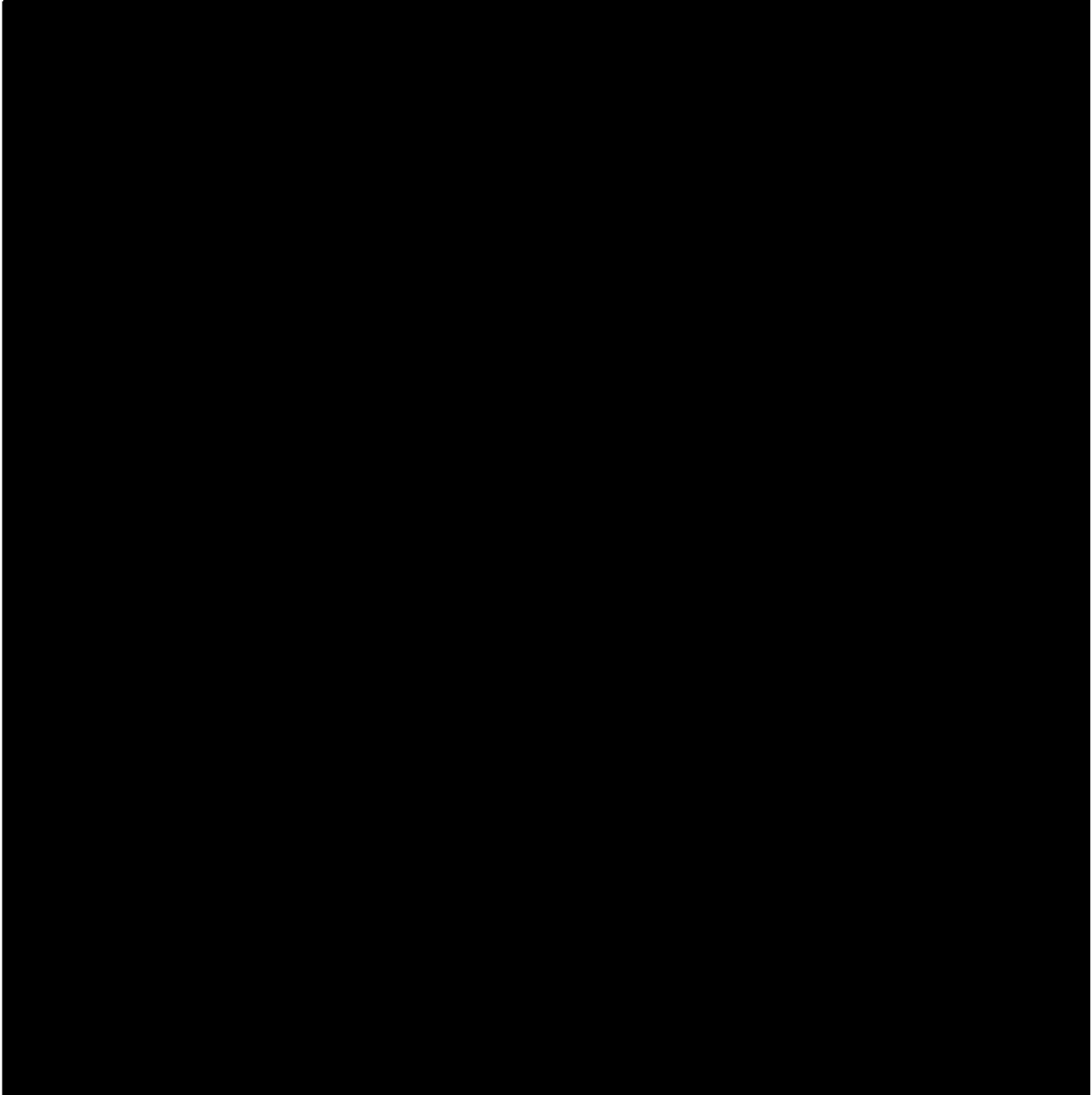
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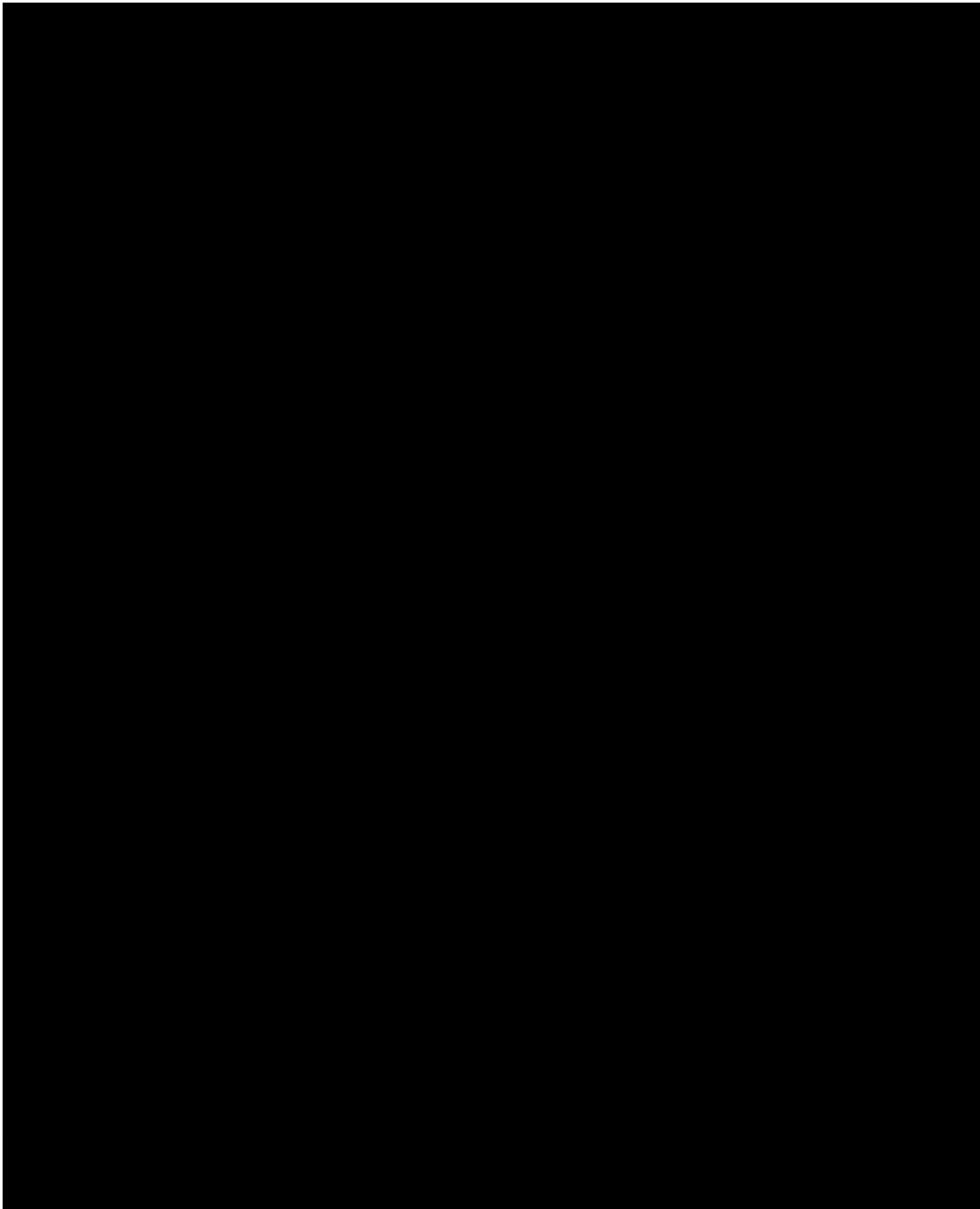


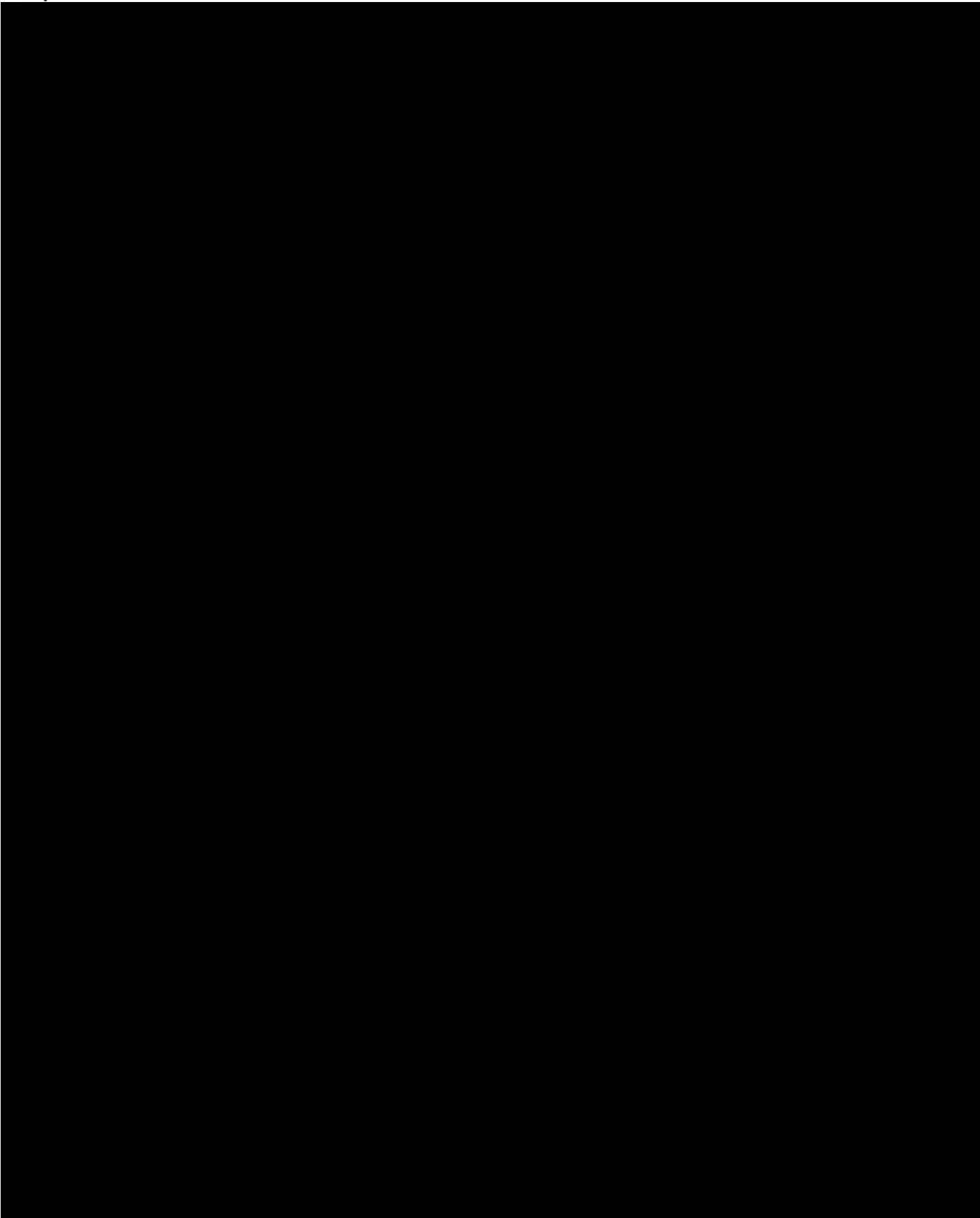
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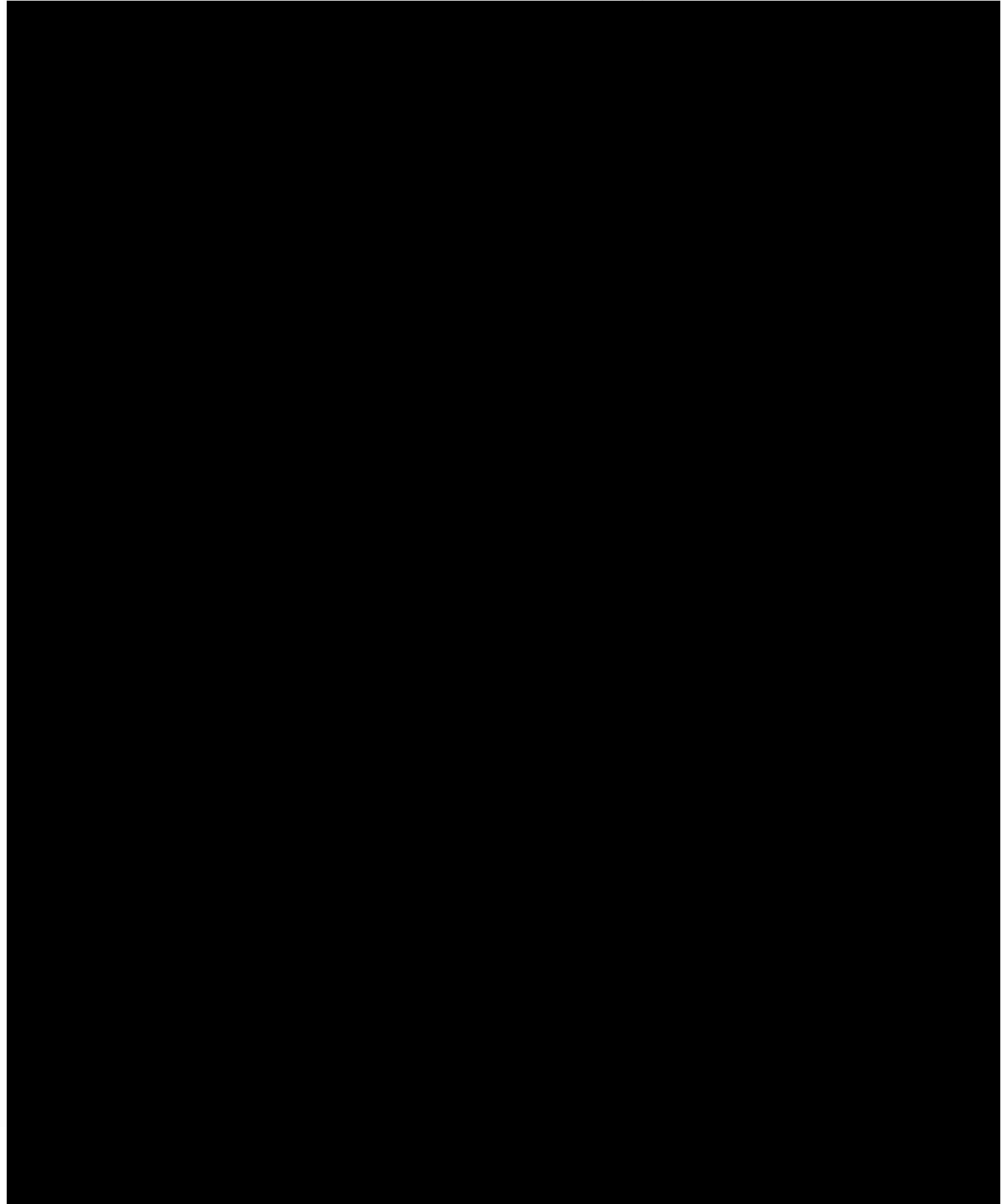
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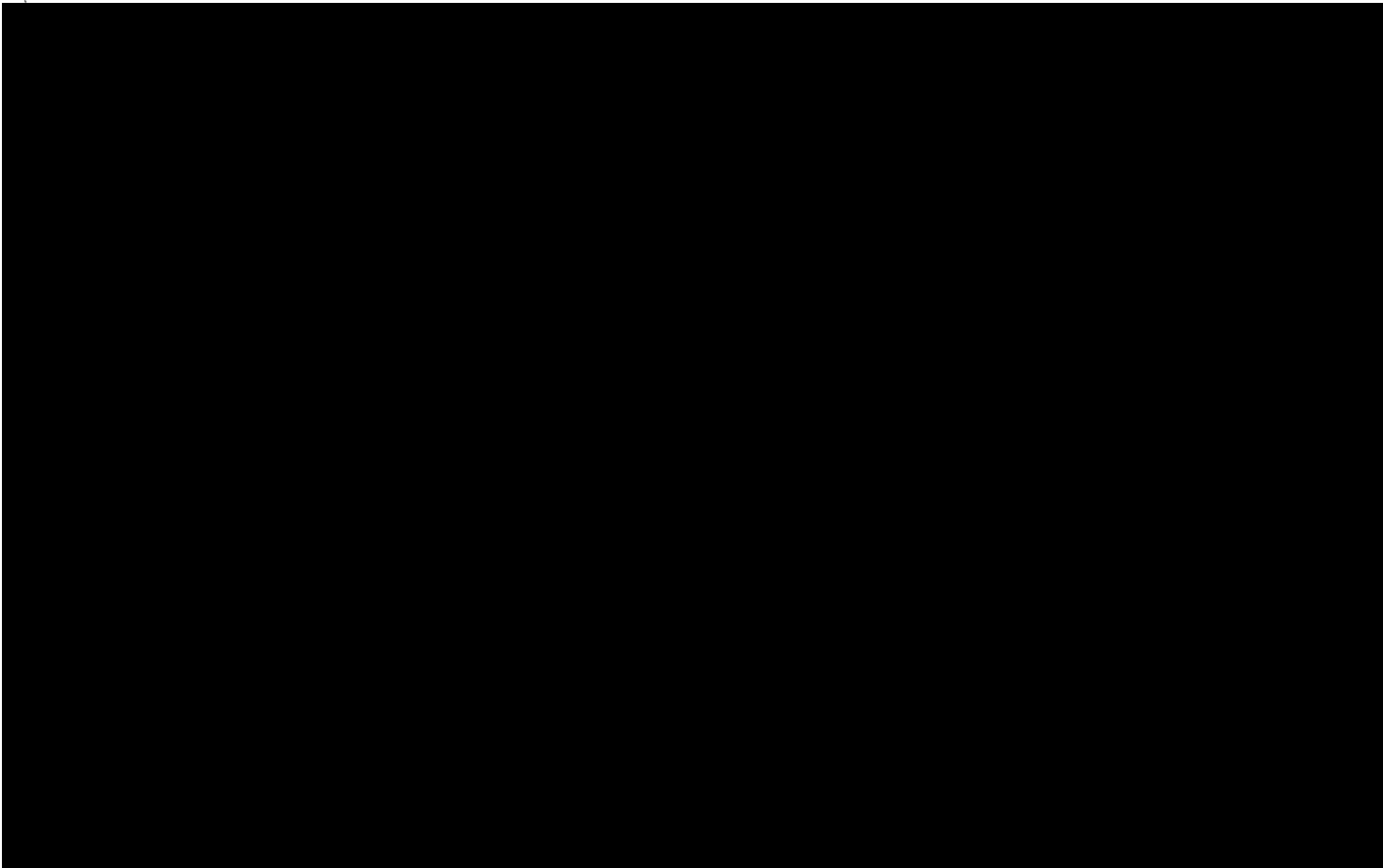


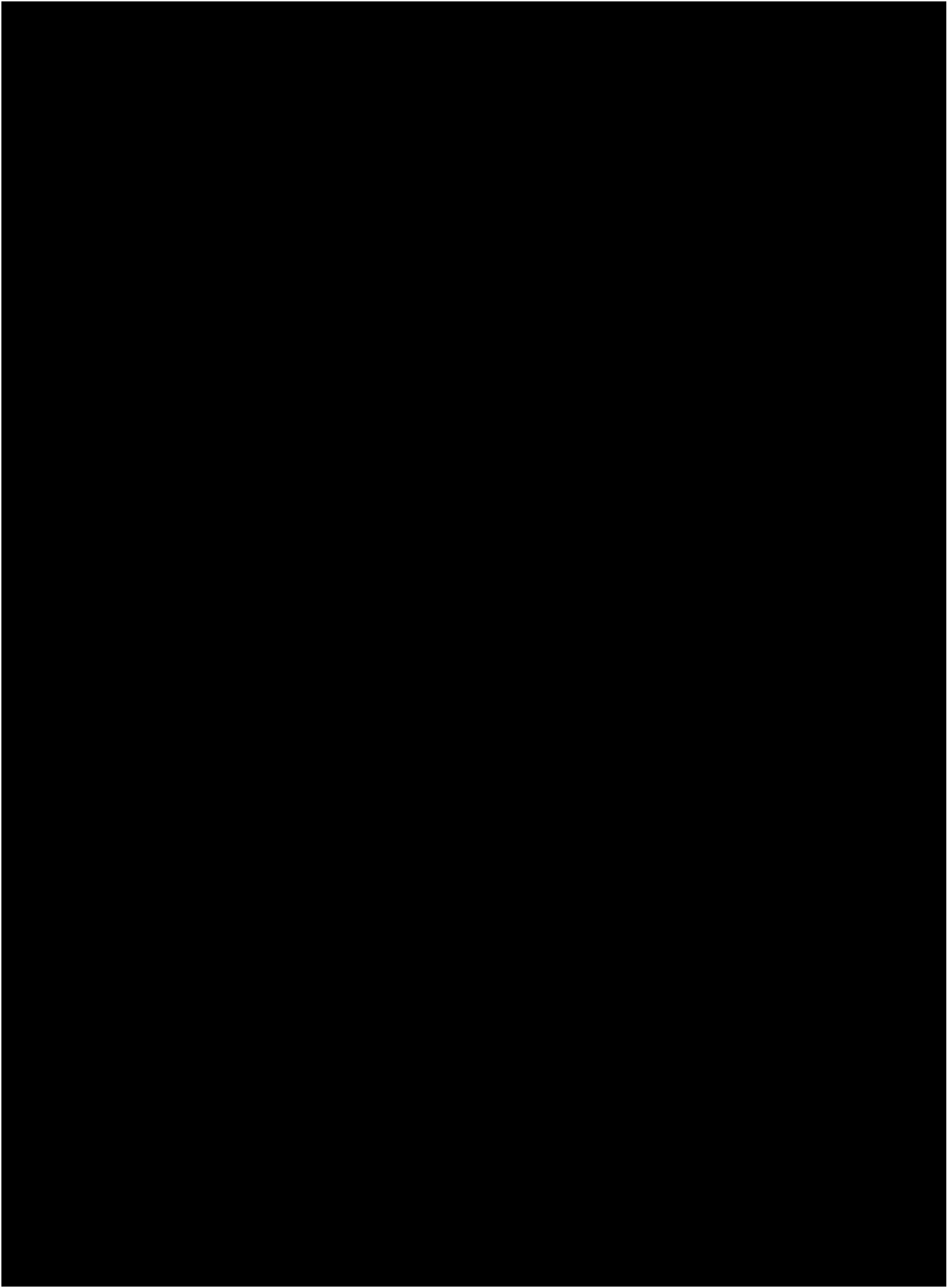
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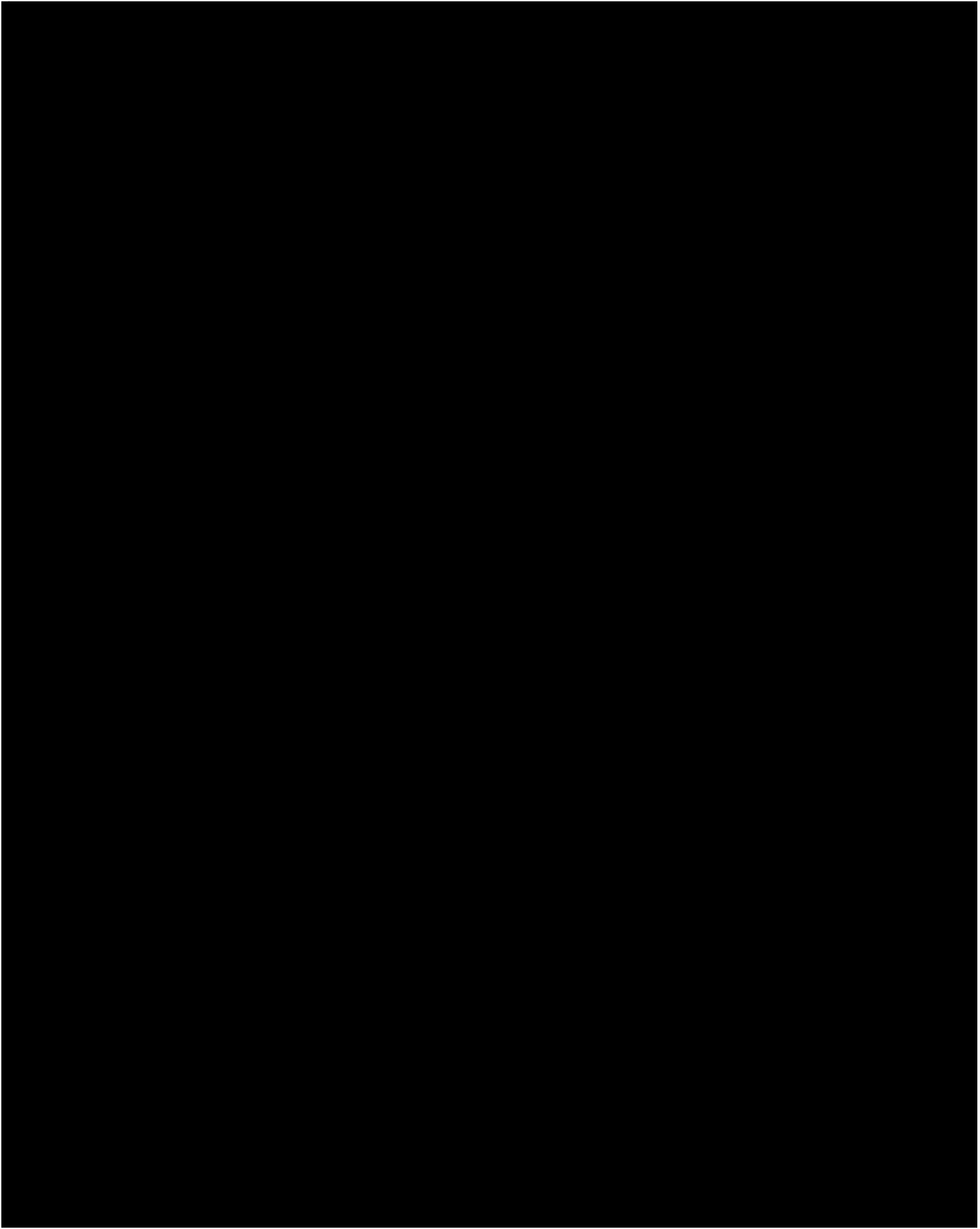


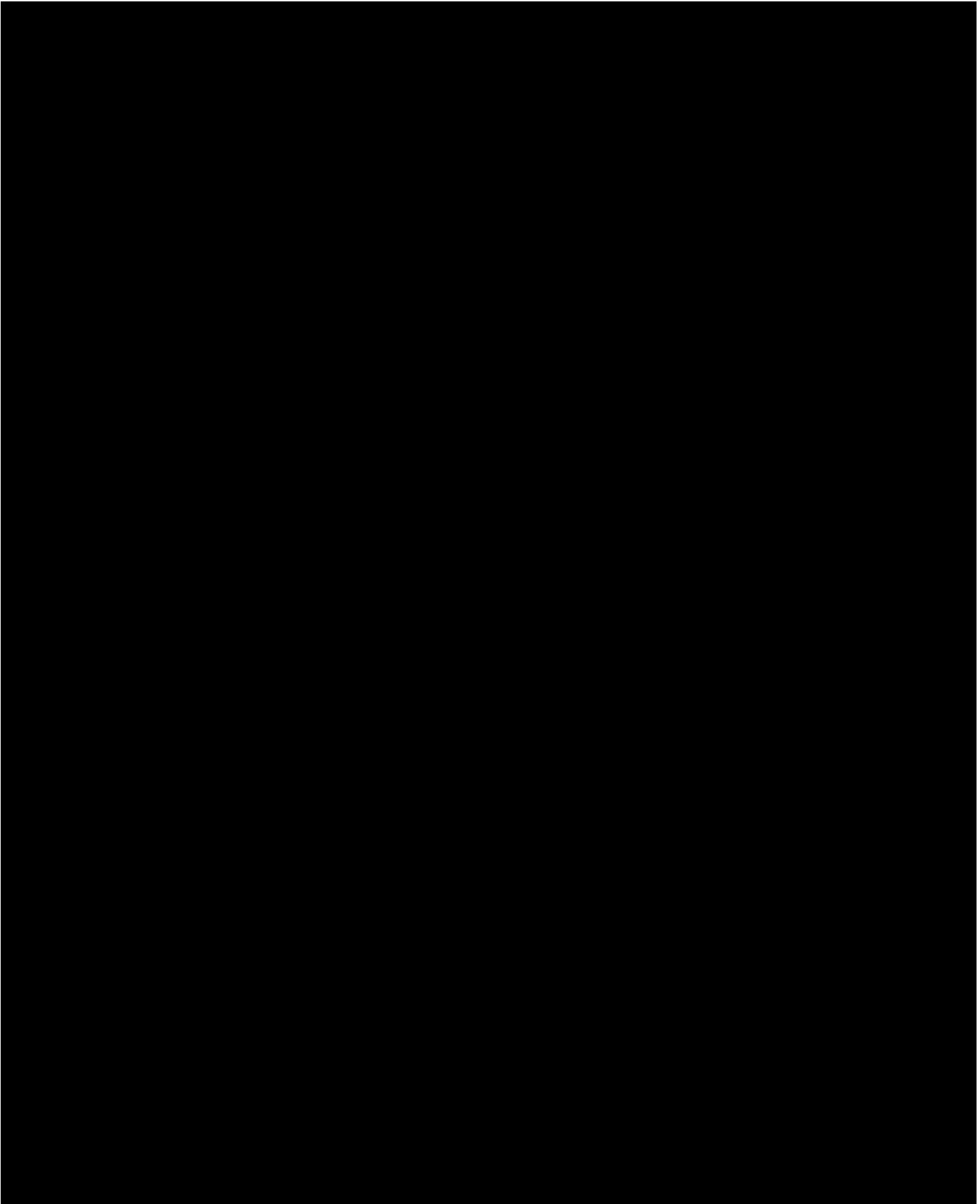








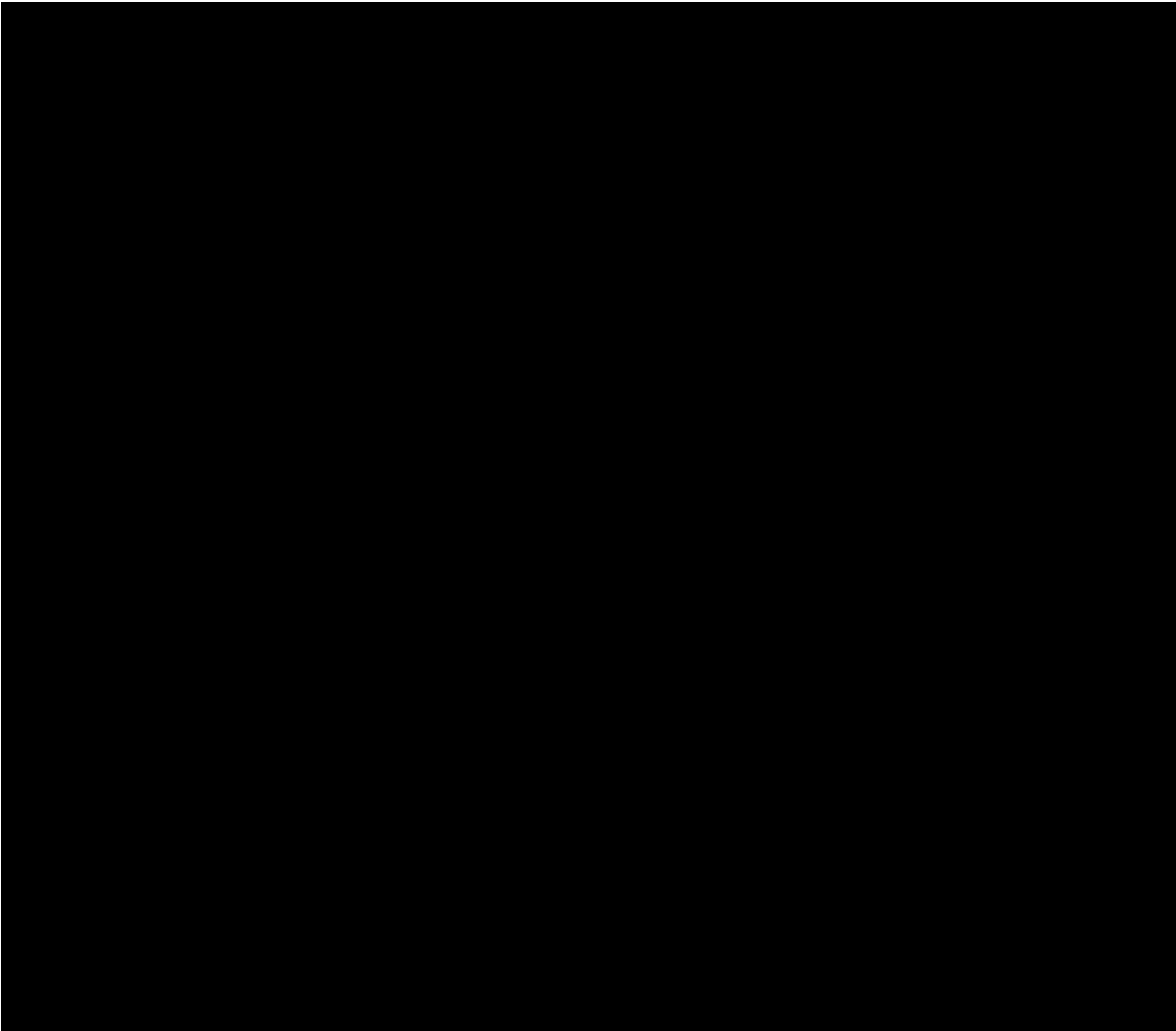


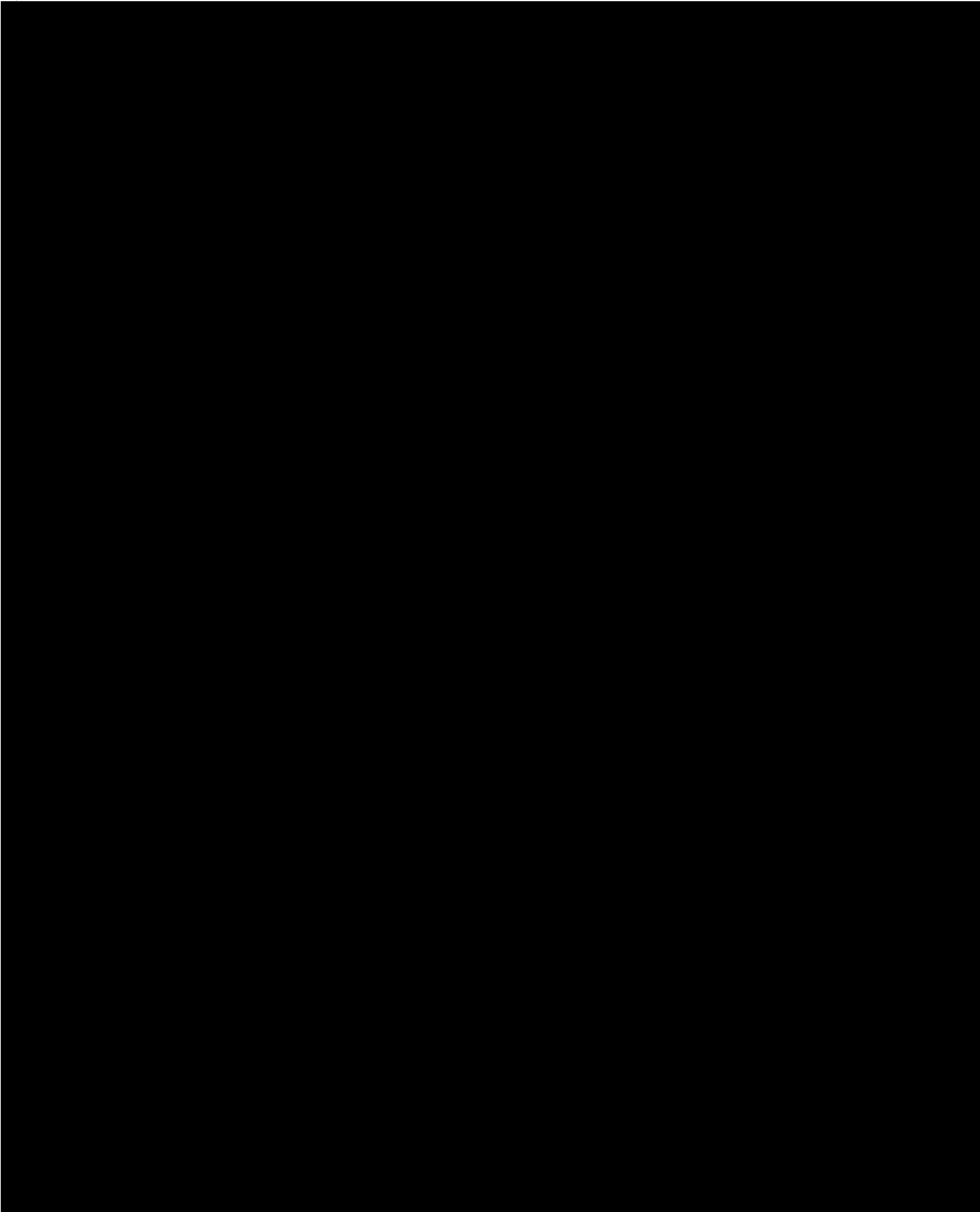


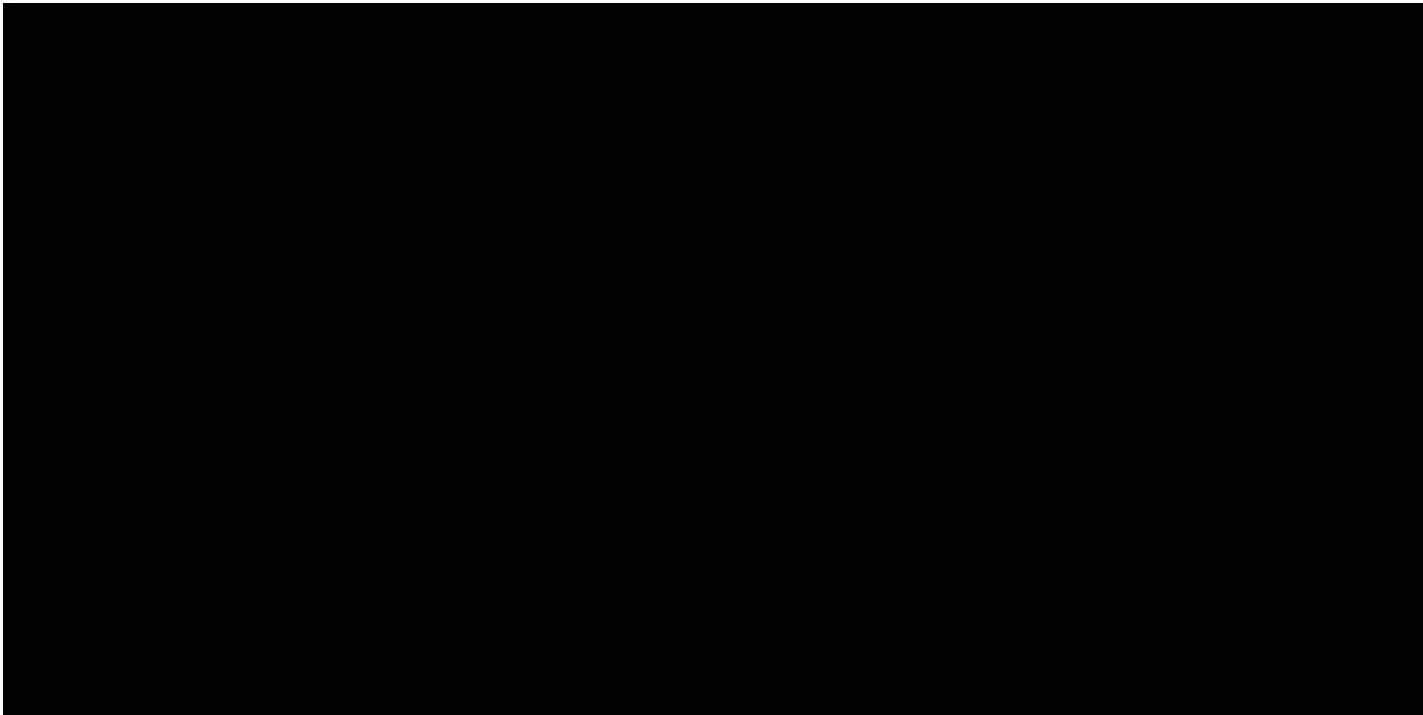


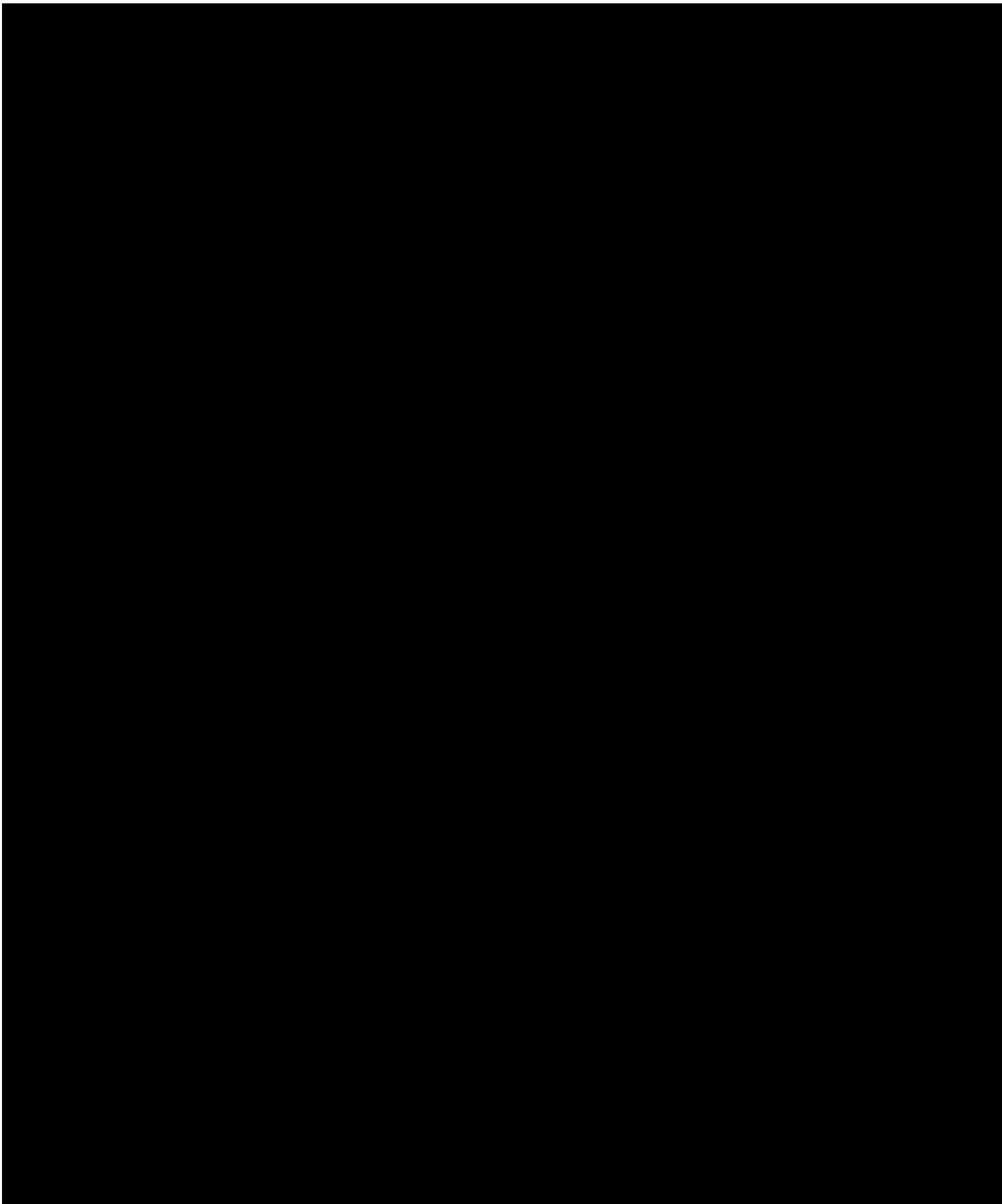
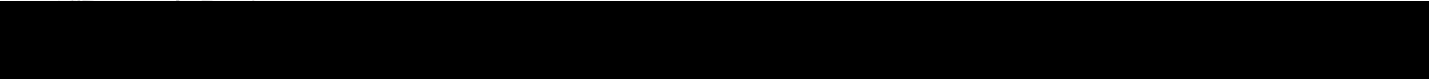
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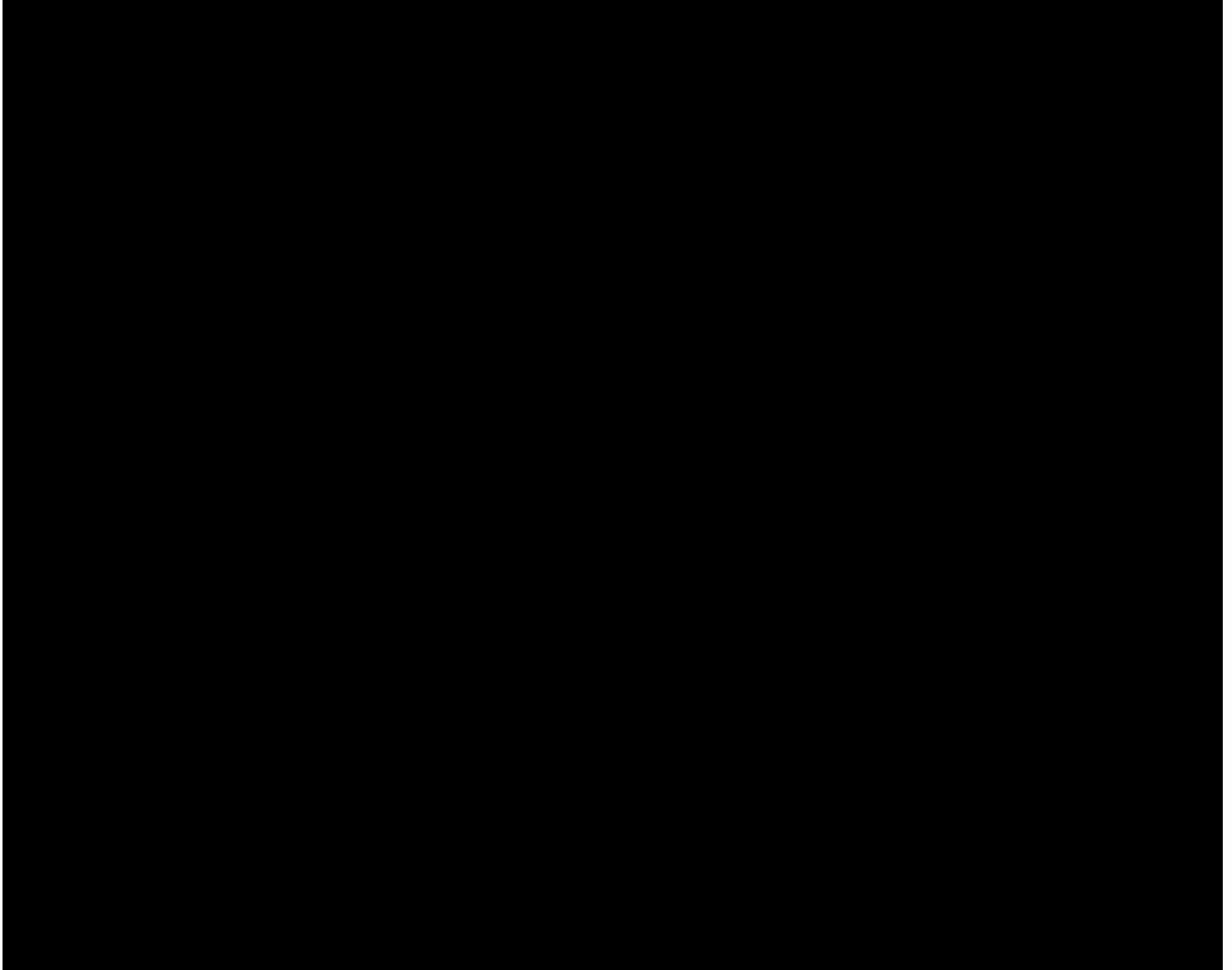


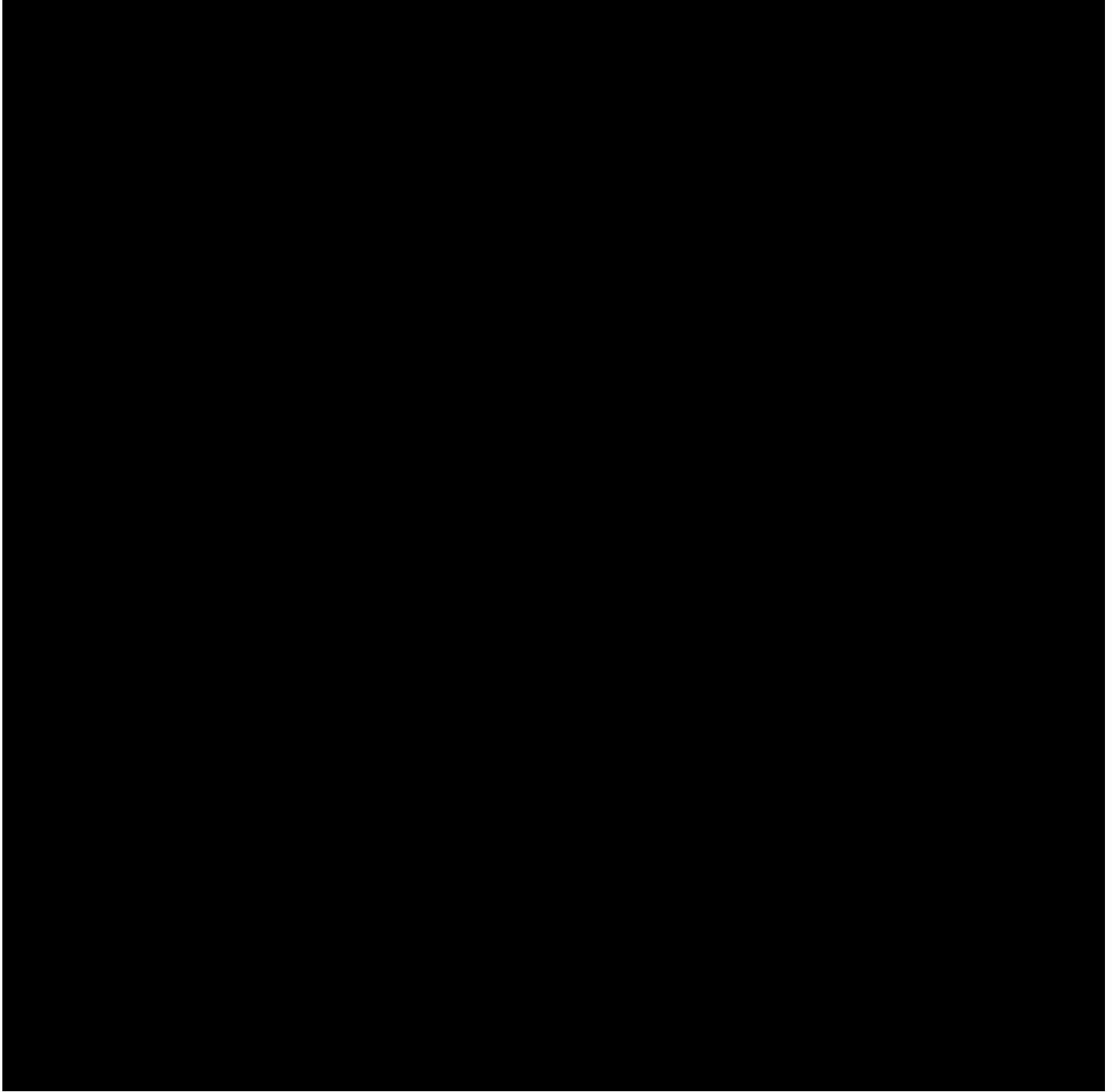


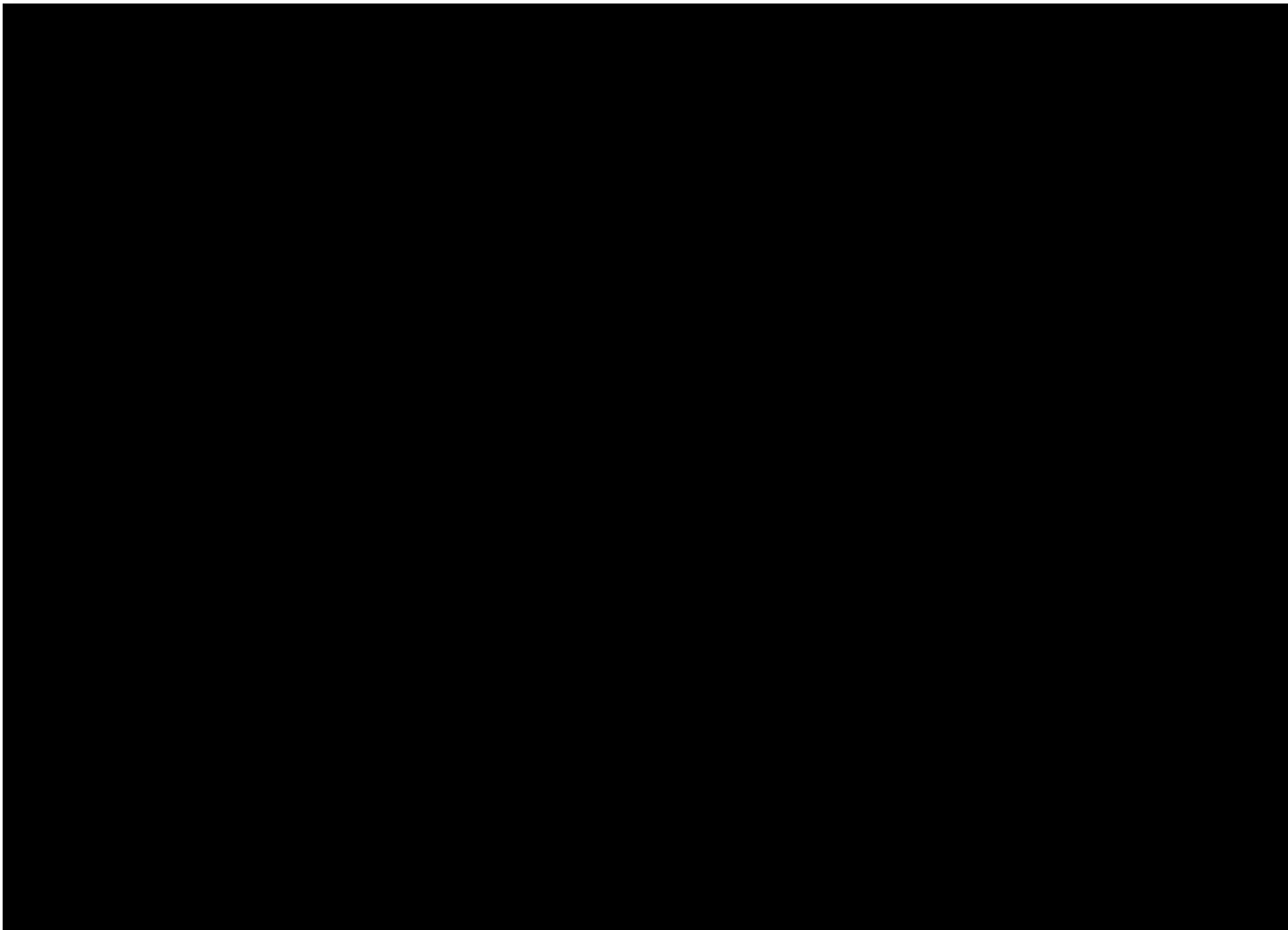


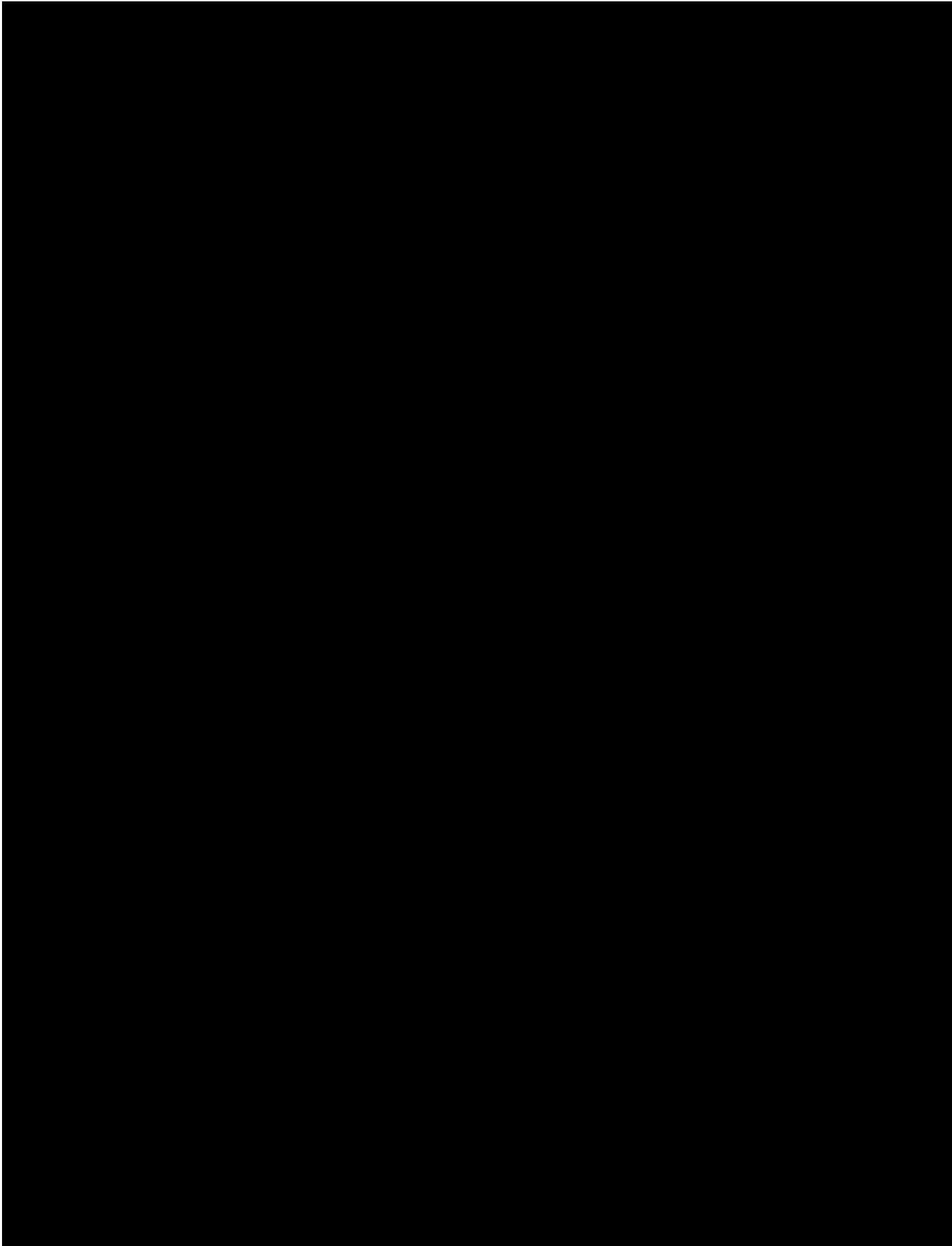


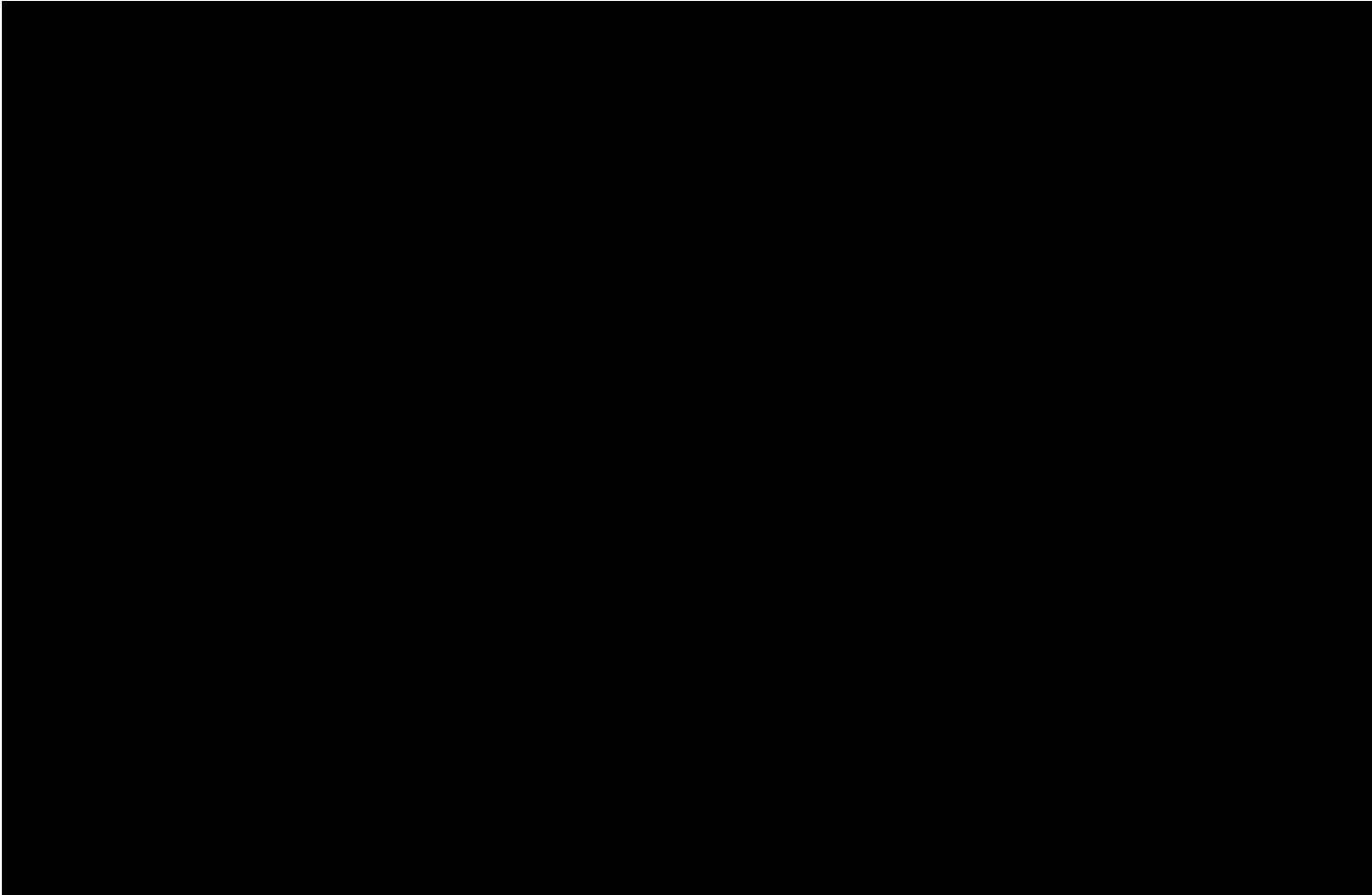


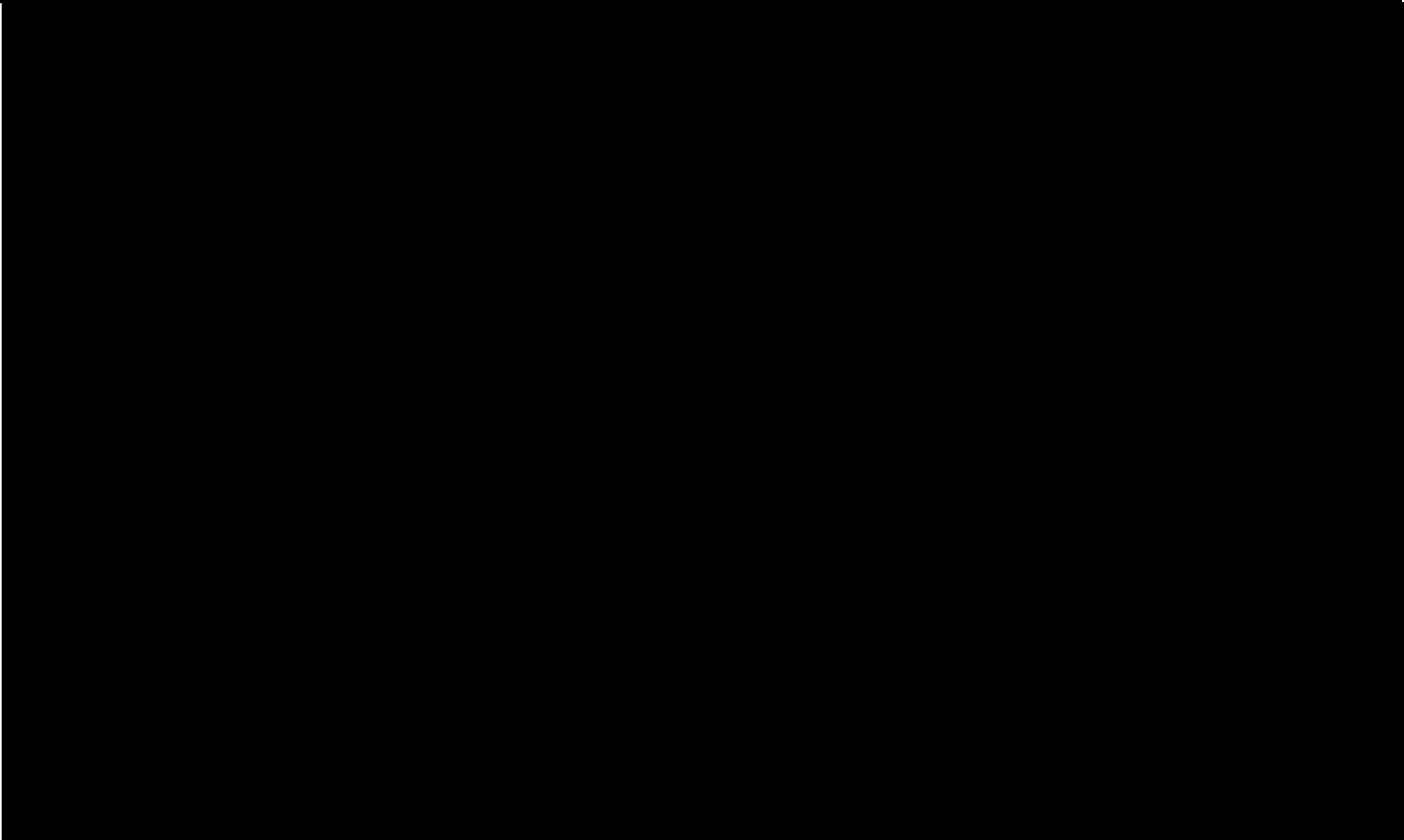
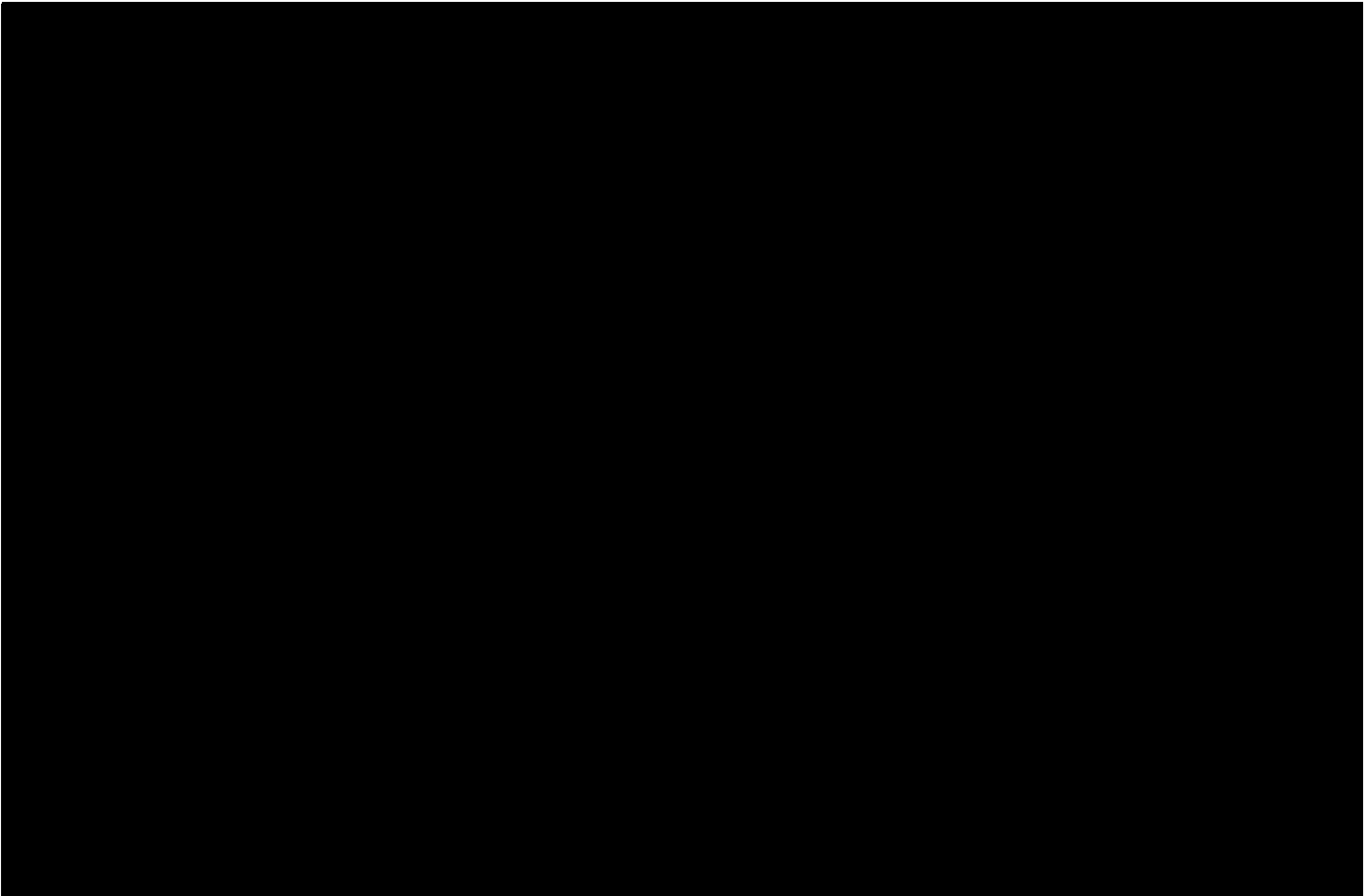












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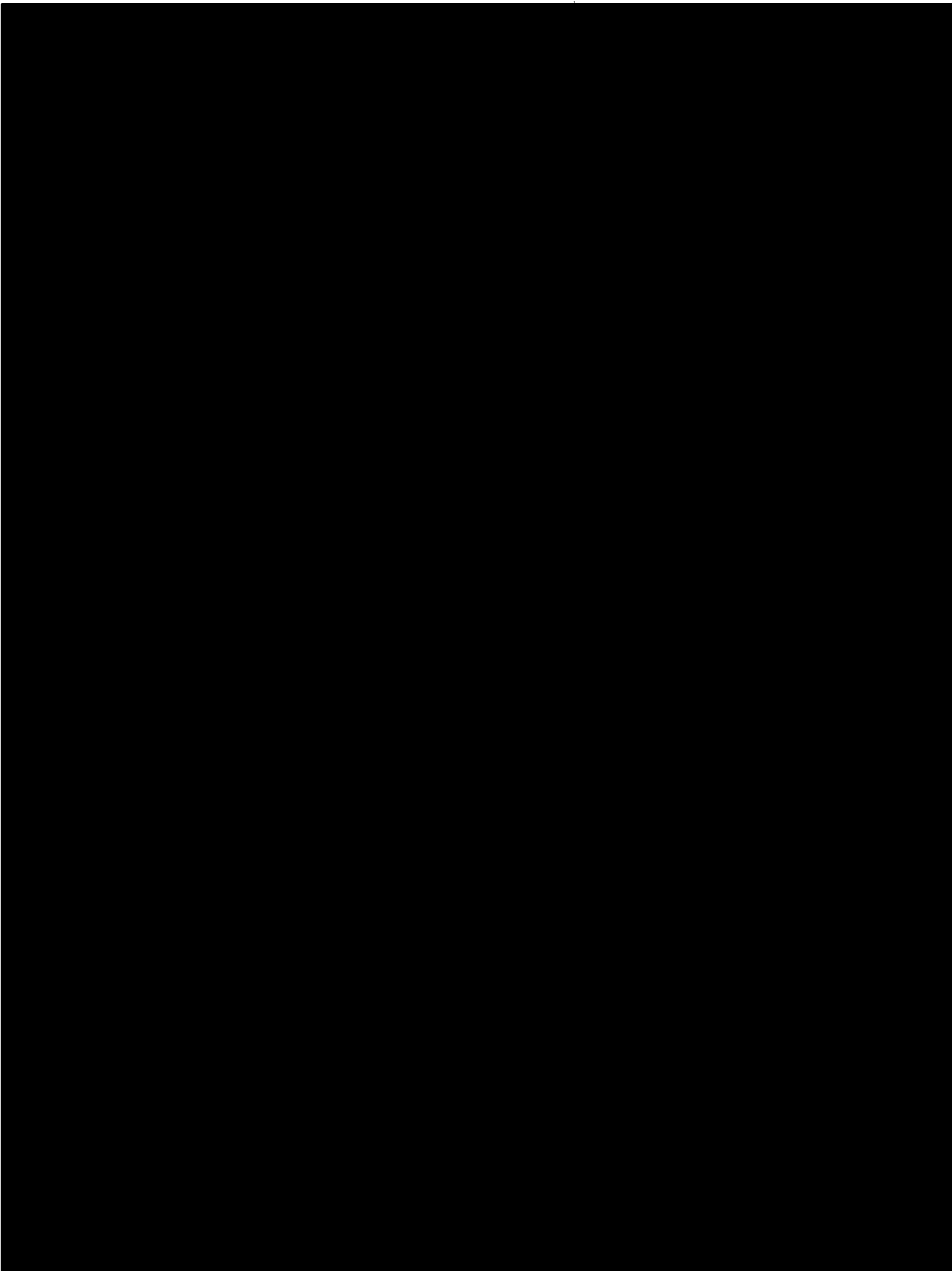
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Subscribed and sworn to before me, a person authorized by Law to administer oaths, this day of Aug,

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Article 136 UCMJ

(Authority to Administer Oaths)

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VANITY FAIR

THE WAR ON TERROR

Rorschach and Awe

America's coercive interrogation methods were reverse-engineered by two C.I.A. psychologists who had spent their careers training U.S. soldiers to endure Communist-style torture techniques. The spread of these tactics was fueled by a myth about a critical "black site" operation.

by KATHERINE EBAN **VF.COM EXCLUSIVE** July 17, 2007

Abu Zubaydah was a mess. It was early April 2002, and the al-Qaeda lieutenant had been shot in the groin during a firefight in Pakistan, then captured by the Special Forces and flown to a safe house in Thailand. Now he was experiencing life as America's first high-value detainee in the wake of 9/11. A medical team and a cluster of F.B.I. and C.I.A. agents stood vigil, all fearing that the next attack on America could happen at any moment. It didn't matter that Zubaydah was unable to eat, drink, sit up, or control his bowels. They wanted him to talk.

A C.I.A. interrogation team was expected but hadn't yet arrived. But the F.B.I. agents who had been nursing his wounds and cleaning him after he'd soiled himself asked Zubaydah what he knew. The detainee said something about a plot against an ally, then began slipping into sepsis. He was probably going to die.



Al-Qaeda lieutenant Abu Zubaydah.
The New York Times/Redux.

The team cabled the morsel of intelligence to C.I.A. headquarters, where it was received with delight by Director George Tenet. "I want to congratulate our officers on the ground," he told a gathering of agents at Langley. When someone explained that the F.B.I. had obtained the information, Tenet blew up and demanded that the C.I.A. get there immediately, say those who were later told of the meeting. Tenet's instructions were clear: Zubaydah was to be kept alive at all costs. (Through his publisher, George Tenet declined to be interviewed.)

Zubaydah was stabilized at the nearest hospital, and the F.B.I. continued its questioning using its typical rapport-building techniques. An agent showed him photographs of suspected al-Qaeda members until Zubaydah finally spoke up, blurting out that "Moktar," or Khalid Shaikh Mohammed, had planned 9/11. He then proceeded to lay out the details of the plot. America learned the truth of how 9/11 was organized because a detainee had come to trust his captors after they treated him humanely.

It was an extraordinary success story. But it was one that would evaporate with the arrival of the C.I.A.'s interrogation team. At the direction of an accompanying psychologist, the team planned to conduct a psychic demolition in which they'd get Zubaydah to reveal everything by severing his sense of personality and scaring him almost to death.

This is the approach President Bush appeared to have in mind when, in a lengthy public address last year, he cited the "tough" but successful interrogation of Zubaydah to defend the C.I.A.'s secret prisons, America's use of coercive interrogation tactics, and the abolishment of habeas corpus for detainees. He said that Zubaydah had been questioned using an "alternative set" of tactics formulated by the C.I.A. This program, he said, was fully

monitored by the C.I.A.'s inspector general and required extensive training for interrogators before they were allowed to question captured terrorists.

While the methods were certainly unorthodox, there is little evidence they were necessary, given the success of the rapport-building approach until that point.

I did not set out to discover how America got into the business of torturing detainees. I wasn't even trying to learn how America found out who was behind 9/11. I was attempting to explain why psychologists, alone among medical professionals, were participating in military interrogations at Guantánamo Bay and elsewhere.

Both army leaders and military psychologists say that psychologists help to make interrogations "safe, legal and effective." But last fall, a psychologist named Jean Maria Arrigo came to see me with a disturbing claim about the American Psychological Association, her profession's 148,000-member trade group. Arrigo had sat on a specially convened A.P.A. task force that, in July 2005, had ruled that psychologists could assist in military interrogations, despite angry objections from many in the profession. The task force also determined that, in cases where international human-rights law conflicts with U.S. law, psychologists could defer to the much looser U.S. standards—what Arrigo called the "Rumsfeld definition" of humane treatment.

Arrigo and several others with her, including a representative from Physicians for Human Rights, had come to believe that the task force had been rigged—stacked with military members (6 of the 10 had ties to the armed services), monitored by observers with undisclosed conflicts of interest, and programmed to reach preordained conclusions.

One theory was that the A.P.A. had given its stamp of approval to military interrogations as part of a quid pro quo. In exchange, they suspected, the Pentagon was working to allow psychologists—who, unlike psychiatrists, are not medical doctors—to prescribe medication, dramatically increasing their income. (The military has championed modern-day psychology since World War II, and continues to be one of the largest single employers of psychologists through its network of veterans' hospitals. It also funded a prescription-drug training program for military psychologists in the early 90s.)

A.P.A. leaders deny any backroom deals and insist that psychologists have helped to stop the abuse of detainees. They say that the association will investigate any reports of ethical lapses by its members.

While there was no "smoking gun" amid the stack of documents Arrigo gave me, my reporting eventually led me to an even graver discovery. After a 10-month investigation comprising more than 70 interviews as well as a detailed review of public and confidential documents, I pieced together the account of the Abu Zubaydah interrogation that appears in this article. I also discovered that psychologists weren't merely complicit in America's aggressive new interrogation regime. Psychologists, working in secrecy, had actually *designed* the tactics and trained interrogators in them while on contract to the C.I.A.



Al-Qaeda operative Khalid Shaikh Mohammed shortly after his capture, 2003. *Corbis*.



President George W. Bush delivers a speech acknowledging the existence of secret C.I.A. prisons such as those where Abu Zubaydah and Khalid Shaikh Mohammed were interrogated, September 2006. *Gerald Herbert/A.P. Photo*.

Two psychologists in particular played a central role: James Elmer Mitchell, who was attached to the C.I.A. team that eventually arrived in Thailand, and his colleague Bruce Jessen. Neither served on the task force or are A.P.A. members. Both worked in a classified military training program known as SERE—for Survival, Evasion, Resistance, Escape—which trains soldiers to endure captivity in enemy hands. Mitchell and Jessen reverse-engineered the tactics inflicted on SERE trainees for use on detainees in the global war on terror, according to psychologists and others with direct knowledge of their activities. The C.I.A. put them in charge of training interrogators in the brutal techniques, including "waterboarding," at its network of "black sites." In a statement, Mitchell and Jessen said, "We are proud of the work we have done for our country."

The agency had famously little experience in conducting interrogations or in eliciting "ticking time bomb" information from detainees. Yet, remarkably, it turned to Mitchell and Jessen, who were equally inexperienced and had no proof of their tactics' effectiveness, say several of their former colleagues. Steve Kleinman, an Air Force Reserve colonel and expert in human-intelligence operations, says he finds it astonishing that the C.I.A. "chose two clinical psychologists who had no intelligence background whatsoever, who had never conducted an interrogation ... to do something that had never been proven in the real world."

The tactics were a "voodoo science," says Michael Rolince, former section chief of the F.B.I.'s International Terrorism Operations. According to a person familiar with the methods, the basic approach was to "break down [the detainees] through isolation, white noise, completely take away their ability to predict the future, create dependence on interrogators."

Interrogators who were sent for classified training inevitably wound up in a Mitchell-Jessen "shop," and some balked at their methods. Instead of the careful training touted by President Bush, some recruits allegedly received on-the-job training during brutal interrogations that effectively unfolded as live demonstrations.

Mitchell and Jessen's methods were so controversial that, among colleagues, the reaction to their names alone became a litmus test of one's attitude toward coercion and human rights. Their critics called them the "Mormon mafia" (a reference to their shared religion) and the "poster boys" (referring to the F.B.I.'s "most wanted" posters, which are where some thought their activities would land them).

The reversed SERE tactics they originated have come to shatter various American communities, putting law enforcement and intelligence gathering on a collision course, fostering dissent within the C.I.A., and sparking a war among psychologists over professional identity that has even led to a threat of physical violence at a normally staid A.P.A. meeting. The spread of the tactics—and the photographs of their wild misuse at Abu Ghraib—devastated America's reputation in the Muslim world. All the while, Mitchell and Jessen have remained more or less behind the curtain, their almost messianic belief in the value of breaking down detainees permeating interrogations throughout the war effort.

"I think [Mitchell and Jessen] have caused more harm to American national security than they'll ever understand," says Kleinman.

The bitterest irony is that the tactics seem to have been adopted by interrogators throughout the U.S. military in part because of a myth that whipped across continents and jumped from the intelligence to the military communities: the false impression that reverse-engineered SERE tactics were the only thing that got Abu Zubaydah to talk.



Former director of central intelligence George Tenet, 2002. © Ron Sachs/CNP/Corbis.

Each branch of the U.S. military offers a variant of the SERE training curriculum. The course simulates the experience of being held prisoner by enemy forces who do not observe the Geneva Conventions. The program evolved after American G.I.'s captured during the Korean War made false confessions under torture. Sure enough, those in SERE training found that they would say anything to get the torment to stop.

During a typical three-week training course, participants endure waterboarding, forced nudity, extreme temperatures, sexual and religious ridicule, agonizing stress positions, and starvation-level rations. Some lose up to 15 pounds. "You're not going to die, but you think you are," says Rolince.

James Mitchell and Bruce Jessen played a key role in developing the Air Force's SERE program, which was administered in Spokane, Washington. Dr. Bryce Lefever, command psychologist on the U.S.S. *Enterprise* and a former SERE trainer who worked with Mitchell and Jessen at the Fairchild Air Base, says he was waterboarded during his own training. "It was terrifying," he remembers. "I said to myself, 'They can't kill me because it's only an exercise.' But you're strapped to an inclined gurney and you're in four-point restraint, your head is almost immobilized, and they pour water between your nose and your mouth, so if you're likely to breathe, you're going to get a lot of water. You go into an oxygen panic."

SERE psychologists such as Mitchell and Jessen play two crucial roles. They screen the trainers who play interrogators, to ensure that they are stable personalities who aren't likely to drift into sadism, and they function as psychic safety officers. If a trainer emerges from an exercise unable to smile, for example, he is viewed as "too into the problem," says Dr. Lefever, and is likely to be removed.

In an ever more dangerous world, some SERE trainers realized that they could market their expertise to corporations and government agencies that send executives and other employees overseas, and a survival-training industry sprang into being.

Mitchell's entry into private contracting began less than three months before September 11 with a scientific consulting company called Knowledge Works, L.L.C. He registered it in North Carolina with the help of another SERE psychologist he'd worked with at Fort Bragg, Dr. John Chin. Since then, he has formed several similar companies, including the Wizard Shop (which he renamed Mind Science) and What If, L.L.C.

In Spokane, several survival companies share space with Mitchell, Jessen & Associates. The firm's executive offices sit behind a locked door with a security code that the receptionist shields from view. There, Mitchell, Jessen maintains a Secure Compartmented Information Facility, or SCIF, for handling classified materials under C.I.A. guidelines, says a person familiar with the facility. But instead of training C.E.O.'s to survive capture, the company principally instructs interrogators on how to break down detainees.

The SERE methods it teaches are based on Communist interrogation techniques that were never designed to get good information. Their goal, says Kleinman, was to generate propaganda by getting beaten-down American hostages to make statements against U.S. interests.

The best and most reliable information comes from people who are relaxed and perceive little threat. "Why would you use evasive training tactics to elicit information?" says Dr. Michael Gelles, former chief psychologist of the Naval Criminal Investigative Service.

The SERE tactics aren't just morally and legally wrong, critics say; they're *tactically* wrong. They produce false leads and hazy memories. "[Mitchell and Jessen] argue, 'We can make people talk,'" says Kleinman. "I have one question. 'About what?'" As one military member who worked in the SERE community says, "Getting somebody to talk and getting someone to give you valid information are two very different things."

And yet, when it came time to extract intelligence from suspected al-Qaeda detainees, SERE experts became "the only other game in town," according to a report, "Educating Information, Interrogation: Science and Art," put out last December by the Intelligence Science Board of the National Defense Intelligence College.

Exactly how that happened remains unclear. Many people assume that Special Forces operatives looked around for interrogation methods, recalled their SERE training, and decided to try the techniques. But the introduction and spread of the tactics were more purposeful, and therefore "far more sinister," says John Sifton, a senior researcher at Human Rights Watch.

Mitchell and Jessen, Sifton says, offered a "patina of pseudo-science that made the C.I.A. and military officials think these guys were experts in unlocking the human mind. It's one thing to say, 'Take off the gloves.' It's another to say there was a science to it. SERE came in as the science."

The use of "scientific credentials in the service of cruel and unlawful practices" harkens back to the Cold War, according to Leonard Rubenstein, executive director of Physicians for Human Rights. Back then, mental-health professionals working with the C.I.A. used hallucinogenic drugs, hypnosis, and extreme sensory deprivation on unwitting subjects to develop mind-control techniques. "We really thought we learned this lesson—that ambition to help national security is no excuse for throwing out ethics and science," Rubenstein says.

Some of those who encountered Mitchell and Jessen at the annual conference of all the military's SERE programs were skeptical of their assertions. "Jim would make statements like, 'We know how people are responding to stress,'" one SERE researcher recalls. "He always said he would show us data, but it would never arrive."

In truth, many did not consider Mitchell and Jessen to be scientists. They possessed no data about the impact of SERE training on the human psyche, say former associates. Nor were they "operational psychologists," like the profilers who work for law enforcement. (Think of Jodie Foster's character in *The Silence of the Lambs*.) But they *wanted* to be, according to several former colleagues.

"It's a seductive role if you work with [elite] combat-type guys," says the military member who works in the SERE community. "There is this wannabe kind of phenomenon. You lose role identity."

Dr. Gelles, who had been at the forefront of trying to stop coercive interrogations at Guantánamo, calls it the "op-doc syndrome": "These SERE guys, who were essentially like school counselors, wanted to be in a position where they had the solution to the operational challenge. They cannot help themselves."

But in the incestuous world of the Special Forces, where all psychologists are referred to as "Doc" and revered as experts, "no one ever questions that you might not have a clue what you're talking about," says an intelligence expert who opposed the use of SERE tactics.

For a 2005 article in *The New Yorker* that raised the question of whether SERE tactics had been reverse-engineered, Jane Mayer asked Mitchell if he was a C.I.A. contractor. He refused to confirm or deny the claim. But the newly minted op-docs Mitchell and Jessen had been among the experts who gathered at a daylong workshop in Arlington, Virginia, in July 2003, to debate the effectiveness of truth serum and other coercive techniques. The conference, titled "Science of Deception: Integration of Practice and Theory," was funded by the C.I.A. and co-hosted by the American Psychological Association and the Rand Corporation. One of its organizers was Kirk Hubbard, then chief of the C.I.A.'s Research and Analysis Branch. Mitchell and Jessen were named on the attendance list as C.I.A. contractors.

A key participant said that, before the conference, Hubbard called and warned him not to publicly identify attendees from the C.I.A. or ask them what they do, saying, "These people have jobs where deception and

interviewing is very important."

Hubbard, who recently retired from the C.I.A., told me when I called him at his home in Montana that he has "no use for liberals who think we should be soft on terrorists." Asked about the work of Mitchell and Jessen, he was silent for a long time, then said, "I can't tell you anything about that."

Mitchell left one clue to his activities in corporate records. In 2004, he filed a notice with North Carolina's secretary of state formally dissolving Knowledge Works. In it, he wrote, "All members of this LLC moved out of the state of NC in March 2002, and subsequently Knowledge Works, LLC ceased to do business 29 March 2002."

Abu Zubaydah had been captured in Pakistan the day before.

One of the first on-the-ground tests for Mitchell's theories was the interrogation of Zubaydah. When he and the other members of the C.I.A. team arrived in Thailand, they immediately put a stop to the efforts at rapport building (which would also yield the name of José Padilla, an American citizen and supposed al-Qaeda operative now on trial in Miami for conspiring to murder and maim people in a foreign country).

Mitchell had a tougher approach in mind. The C.I.A. interrogators explained that they were going to become Zubaydah's "God." If he refused to cooperate, he would lose his clothes and his comforts one by one. At the safe house, the interrogators isolated him. They would enter his room just once a day to say, "You know what I want," then leave again.

As Zubaydah clammed up, Mitchell seemed to conclude that Zubaydah would talk only when he had been reduced to complete helplessness and dependence. With that goal in mind, the C.I.A. team began building a coffin in which they planned to bury the detainee alive.

A furor erupted over the legality of this move, which does not appear to have been carried out. (Every human-rights treaty and American law governing the treatment of prisoners prohibits death threats and simulated killings.) But the C.I.A. had a ready rejoinder: the methods had already been approved by White House lawyers. Mitchell was accompanied by another psychologist, Dr. R. Scott Shumate, then chief operational psychologist for the C.I.A.'s counterterrorism center. Surprisingly, Shumate opposed the extreme methods and packed his bags in disgust, leaving before the most dire tactics had commenced. He later told associates that it had been a mistake for the C.I.A. to hire Mitchell.

With Shumate gone, the interrogators were free to unleash what they called the "SERE school" techniques. These included blasting the Red Hot Chili Peppers at top volume, stripping Zubaydah naked, and making his room so cold that his body turned blue, as *The New York Times* reported last year.

Ultimately, the F.B.I. pulled its agents from the scene and ruled that they could not be present any time coercive tactics were used, says Michael Rolince. It was a momentous decision that effectively gave the C.I.A. complete control of interrogations.

While it was the F.B.I.'s rapport-building that had prompted Zubaydah to talk, the C.I.A. would go on to claim credit for breaking Zubaydah, and celebrate Mitchell as a psychological wizard who held the key to getting hardened terrorists to talk. Word soon spread that Mitchell and Jessen had been awarded a medal by the C.I.A. for their advanced interrogation techniques. While the claim is impossible to confirm, what matters is that others believed it. The reputed success of the tactics was "absolutely in the ether," says one Pentagon civilian who worked on detainee policy.

In response to detailed questions from *Vanity Fair*, Mitchell and Jessen said in a statement, "The advice we have provided, and the actions we have taken have been legal and ethical. We resolutely oppose torture. Under no circumstances have we ever endorsed, nor would we endorse, the use of interrogation methods designed to do physical or psychological harm."

The C.I.A. would not comment on Mitchell's and Jessen's role. However, a C.I.A. spokesman said the agency's interrogation program was implemented lawfully and had produced vital intelligence.

Dr. Shumate, who now works in the Defense Department as director of the Behavioral Sciences Directorate within the Counterintelligence Field Activity (CIFA), did not respond to interview requests. But a CIFA spokesman said that Dr. Shumate, who served on the A.P.A.'s task force, supported the association's "guidelines that psychologists conduct themselves in an ethical and professional manner regardless of mission assignment or activity."

Colonel Brittain P. Mallow, 51, was the ultimate straight-up soldier: blue-eyed and poker-faced, with a winning if seldom-seen smile. After 9/11, he was put in command of the Defense Department's Criminal Investigative Task Force (C.I.T.F.), which was charged with assessing which detainees at Guantánamo Bay should be prosecuted. Mallow, who has an advanced degree in Middle East studies and a working knowledge of Arabic, foresaw that the interrogations would be culturally difficult. So his team called on Dr. Michael Gelles, of the Naval Criminal Investigative Service, to form a Behavioral Science Consultation Team (BSCT, pronounced "biscuit") of non-clinical psychologists. Its mission was to help establish rapport with detainees.

By the summer of 2002, Mallow was hearing disturbing reports of blasting music and strobe lights coming from the interrogation booths. This was the work of Task Force 170, the Pentagon unit in charge of intelligence gathering in the Southern Command. According to one of Mallow's deputies, the members of Task Force 170 considered the C.I.T.F. to be soft on detainees. They were "hell-bent" on using harsher tactics, another C.I.T.F. official says.

"There were a number of claims that coercive methods had achieved results" during "interrogations in other places," Mallow says. The other C.I.T.F. official recalls that a Task Force 170 officer told him, "Other people are using this stuff, and they're getting praised." (A Pentagon spokesman said all questioning at Guantánamo is lawful and falls within the limits set by the army field manual.)

At a Pentagon meeting where Mallow protested the methods, he says that a civilian official named Marshall Billingslea told him, "You don't know what you're talking about." Billingslea insisted that the coercive approach worked.

Just months after Zubaydah's interrogation, the myth of Mitchell and Jessen's success in breaking him had made its way from Thailand to Guantánamo to Washington, and the reversed SERE tactics had become associated with recognition and inside knowledge.

In late spring, Mallow met with Major General Michael E. Dunlavey, who was about to take over as commander of the newly combined JTF-GTMO 170 (Joint Task Force Guantánamo). Mallow briefed Dunlavey on his BSCT team's rapport-building efforts and offered him full access to the psychologists. About a month later, he claims, Dunlavey had appropriated the acronym but set up a separate BSCT team, cobbled together in part from clinical psychologists already at Guantánamo. Before activating the new BSCT team, Dunlavey sent its members to Fort Bragg for a four-day SERE-school workshop. (Dunlavey, now a juvenile-court judge in Erie, Pennsylvania, did not respond to requests for comment.)

On December 2, 2002, Secretary of Defense Donald Rumsfeld granted JTF-GTMO 170's request to apply

coercive tactics in interrogations. The only techniques he rejected were waterboarding and death threats. Within a week, the task force had drafted a five-page, typo-ridden document entitled "JTF GTMO 'SERE' Interrogation Standard Operating Procedure."

The document, which has never before been made public, states, "The premise behind this is that the interrogation tactics used at US military SERE schools are appropriate for use in real-world interrogations" and "can be used to break real detainees."

The document is divided into four categories: "Degradation," "Physical Debilitation," "Isolation and Monopolization [sic] of Perception," and "Demonstrated Omnipotence." The tactics include "slaps," "forceful removal of detainees' clothing," "stress positions," "hooding," "manhandling," and "walling," which entails grabbing the detainee by his shirt and hoisting him against a specially constructed wall.

"Note that all tactics are strictly non-lethal," the memo states, adding, "IT IS CRITICAL THAT INTERROGATORS DO 'CROSS THE LINE' WHEN UTILIZING THE TACTICS." The word "NOT" was presumably omitted by accident.

It is not clear whether the guidelines were ever formally adopted. But the instructions suggest that the military command wanted psychologists to be involved so they could lead interrogators up to the line, then stop them from crossing it.

In a bizarre mixture of solicitude and sadism, the memo details how to calibrate the infliction of harm. It dictates that the "[insult] slap will be initiated no more than 12–14 inches (or one shoulder width) from the detainee's face ... to preclude any tendency to wind up or uppercut." And interrogators are advised that, when stripping off a prisoner's clothes, "tearing motions shall be downward to prevent pulling the detainee off balance." In short, the SERE-inspired interrogations would be violent. And therefore, psychologists were needed to help make these *more dangerous* interrogations *safer*.

Soon, the reverse-engineered SERE tactics that had been designed by Mitchell and Jessen, road-tested in the C.I.A.'s black sites, and adopted in Guantánamo were being used in Iraq as well. One intelligence officer recalled witnessing a live demonstration of the tactics. The detainee was on his knees in a room painted black and forced to hold an iron bar in his extended hands while interrogators slapped him repeatedly. The man was then taken into a bunker, where he was stripped naked, blindfolded, and shackled. He was ordered to be left that way for 12 hours.

At the Abu Ghraib prison, military policemen on the night shift adopted the tactics to hideous effect. In what amounted to a down-market parody of the praise heaped on Mitchell and Jessen, Specialist Charles A. Graner Jr., a former prison guard from Pennsylvania, received a commendation for his work "softening up" detainees, according to the documentary *The Ghosts of Abu Ghraib*. He appears repeatedly in photographs, smiling and giving thumbs-up before human pyramids of naked detainees. In 2005, he was convicted on charges of abuse. In their statement, Mitchell and Jessen said that they were "appalled by reports" of alleged abuses at Abu Ghraib and Guantánamo and had not been involved with them in any way.

Supreme Court justice Antonin Scalia recently made his case for heavy-handed interrogation tactics via a surprisingly current pop-culture reference. "Jack Bauer saved Los Angeles," he told a panel of judges, referring to the torturer protagonist of the Fox series *24*. "Are you going to convict Jack Bauer?"

In the real world, however, it is increasingly clear that the U.S. has sacrificed its global image for tactics that are at best ineffective. "We are not aware of any convincing evidence that coercive tactics work better than other methods of obtaining actionable intelligence," said Senator Carl Levin, Democrat of Michigan.

Under Levin's leadership, the Senate Armed Services Committee has been probing the military's alleged mistreatment of detainees and intends to hold hearings. In a statement to *Vanity Fair*, Levin says that he finds the reported use of SERE tactics in interrogations "very troubling," and that his committee is looking specifically at "the accountability of officials for actions or failures to act."

Mitchell and Jessen have become a focus of the investigation. In June, the online news magazine *Salon* reported that the Defense Department, responding to a request from Levin's committee, ordered top Pentagon officials to preserve any documents mentioning the two psychologists or their company in Spokane.

Meanwhile, business appears to be booming at Mitchell, Jessen & Associates. It has 120 employees and specializes in "understanding, predicting, and improving performance in high-risk and extreme situations," according to a recruitment ad at a recent job fair for people with top security clearances.

The principals of Mitchell, Jessen & Associates are raking in money. According to people familiar with their compensation, they get paid more than \$1,000 per day plus expenses, tax free, for their overseas work. It beats military pay. Mitchell has built his dream house in Florida. He also purchased a BMW through one of his companies. "Taxpayers are paying at least half a million dollars a year for these two knuckleheads to do voodoo," says one of the people familiar with their pay arrangements.

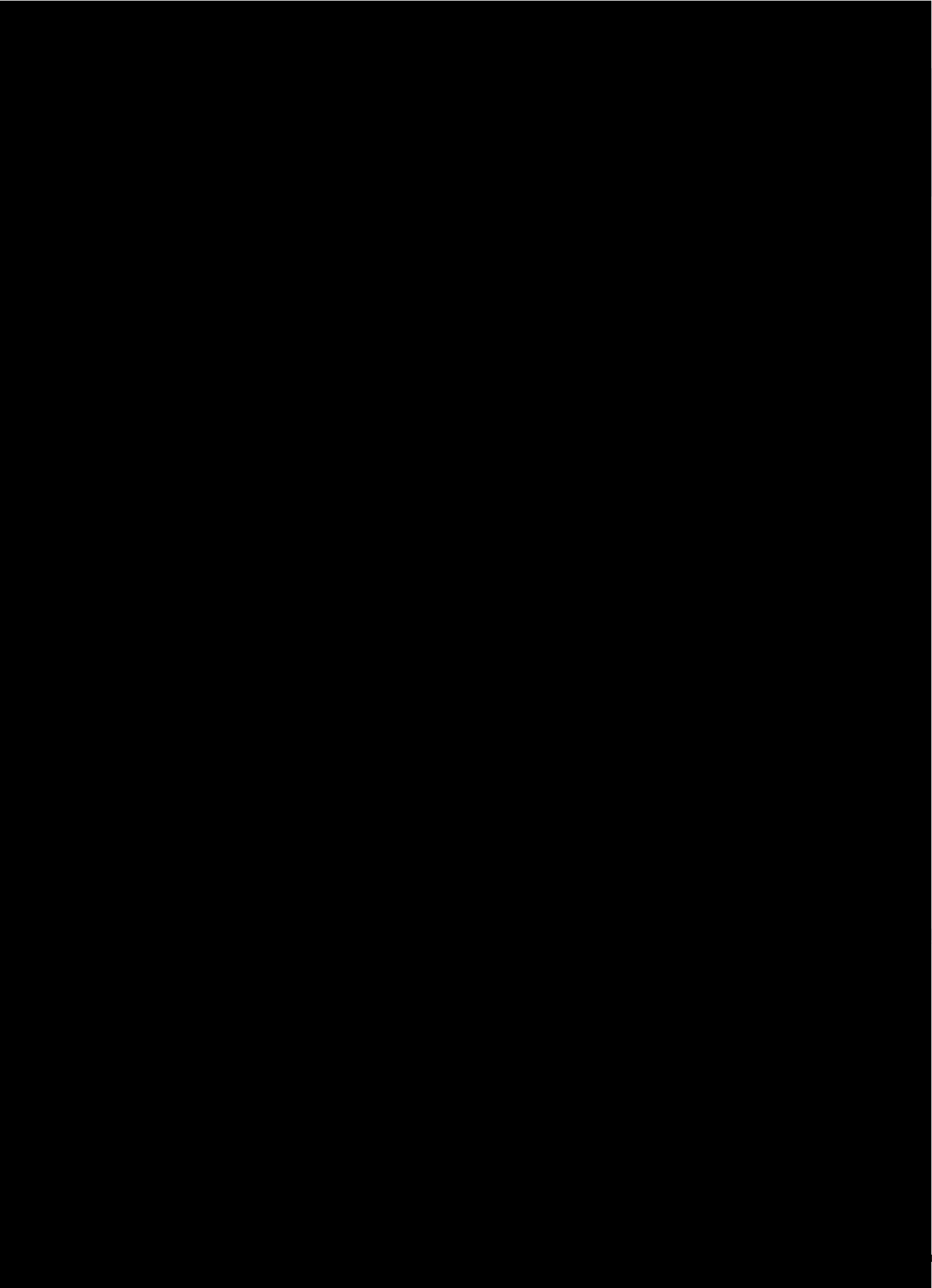
Last December, the nation's best-known interrogation experts joined together to release a report, called "Educating Information," that sought to comprehensively address the question of which methods work in interrogations.

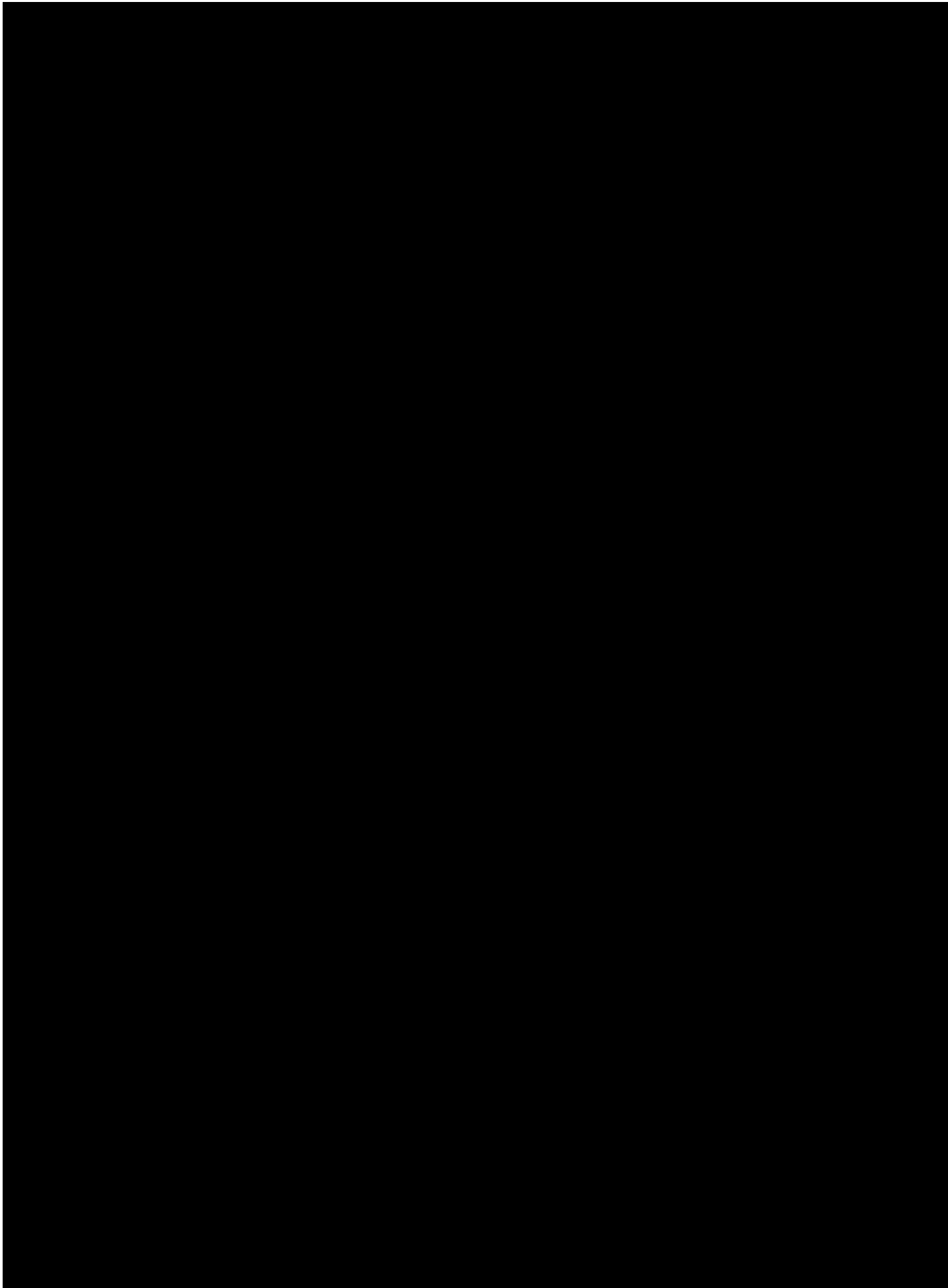
Scott Shumate served as an adviser to the report, which concluded that there is no evidence that reverse-engineered SERE tactics work, or that SERE psychologists make for capable interrogators. One chapter, authored by Kleinman, concludes: "Employment of resistance interrogators—whether as consultants or as practitioners—is an example of the proverbial attempt to place the square peg in the round hole."

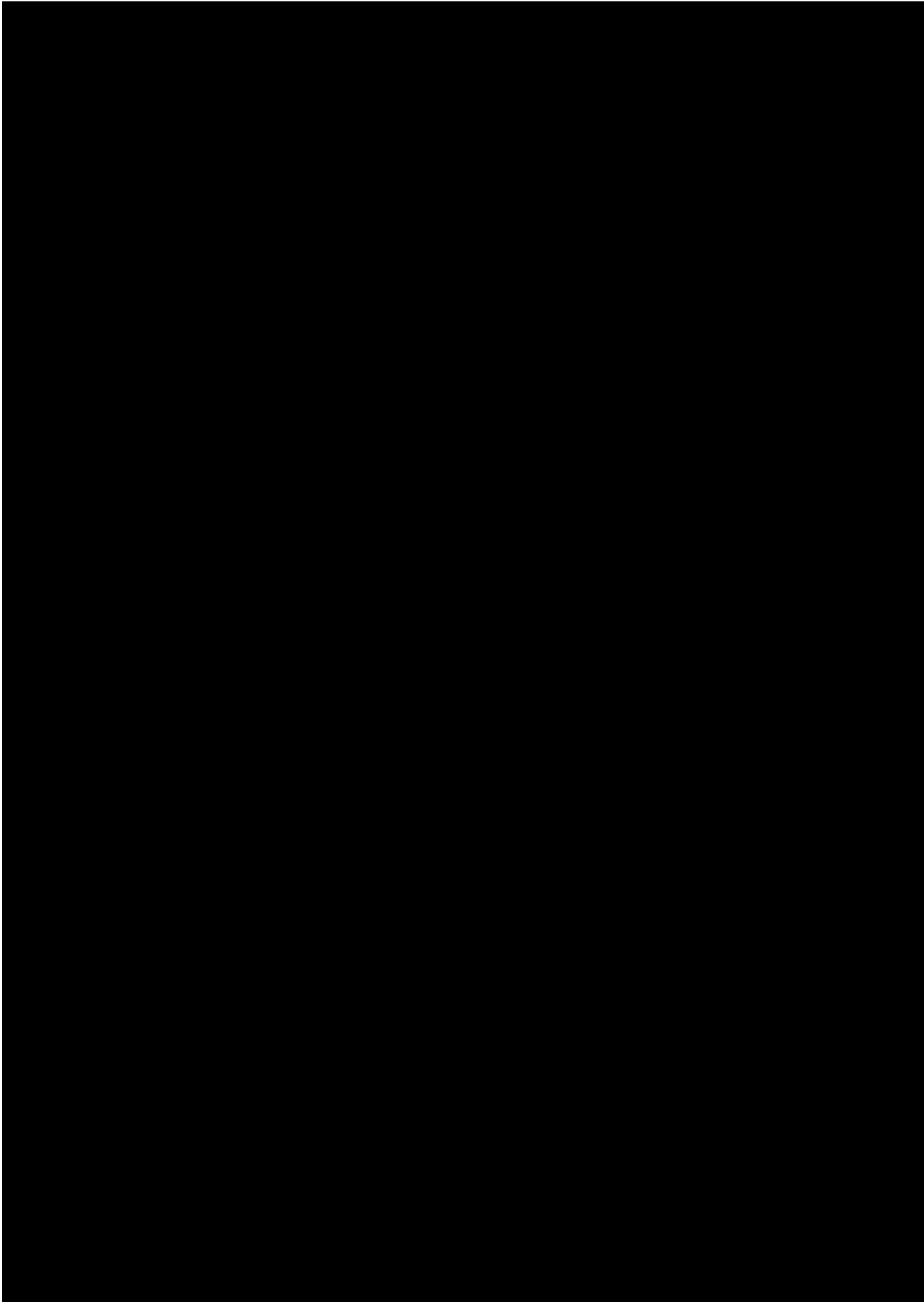
But it is one of the features of our war on terror that myths die hard. Just think of the al-Qaeda—Iraq connection, or Saddam Hussein's W.M.D. In late 2005, as Senator John McCain was pressing the Bush administration to ban torture techniques, one of the nation's top researchers of stress in SERE trainees claims to have received a call from Samantha Ravitch, the deputy assistant for national security in Vice President Dick Cheney's office. She wanted to know if the researcher had found any evidence that uncontrollable stress would make people more likely to talk.

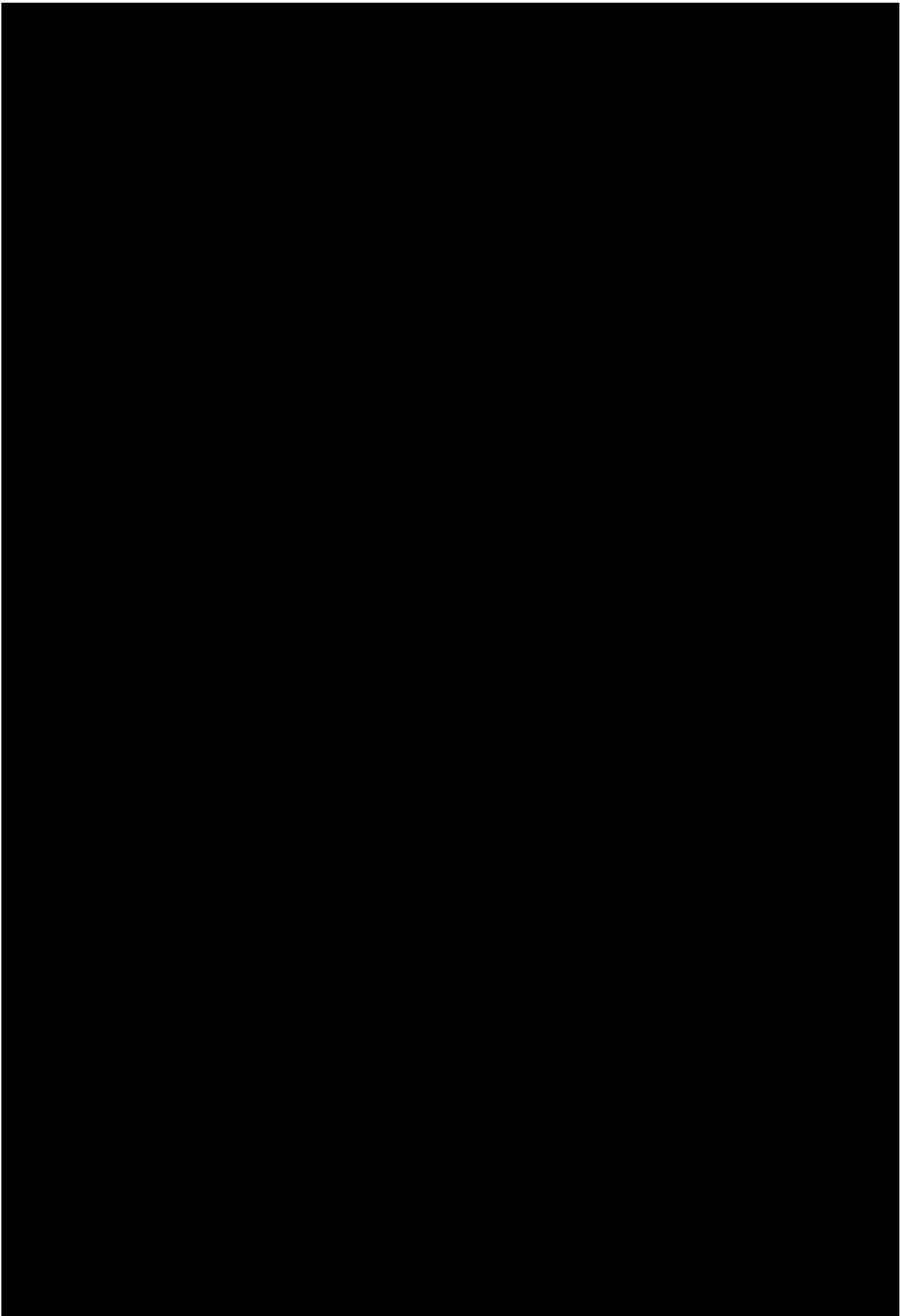
Katherine Eban is a Brooklyn-based journalist and Alicia Patterson fellow who writes about issues of public health and homeland security. Her book, *Dangerous Doses: A True Story of Cops, Counterfeiters, and the Contamination of America's Drug Supply*, was excerpted in the May 2005 issue of *Vanity Fair*.

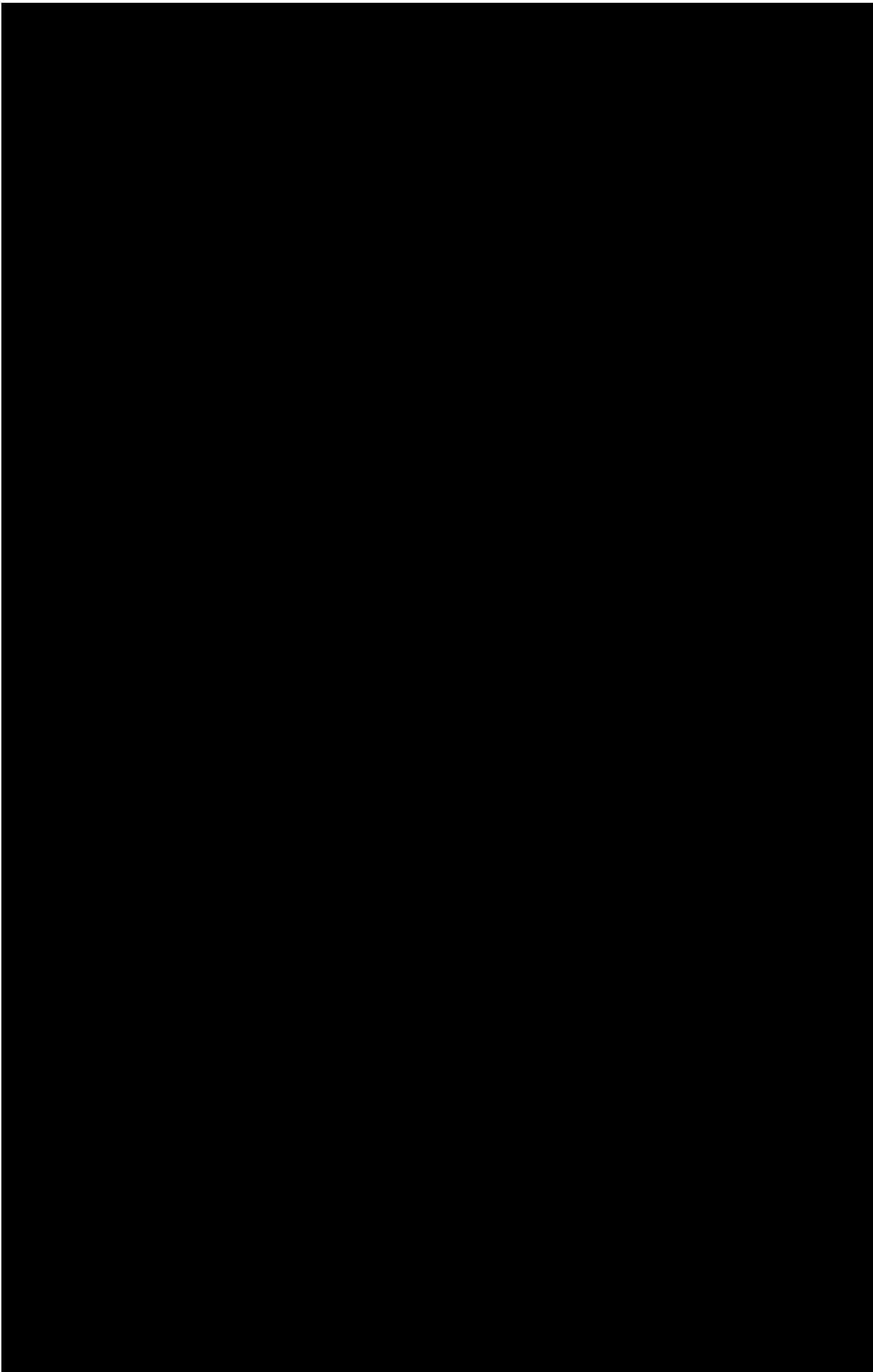
[digg this](#)[add to del.icio.us](#)[add to reddit](#)

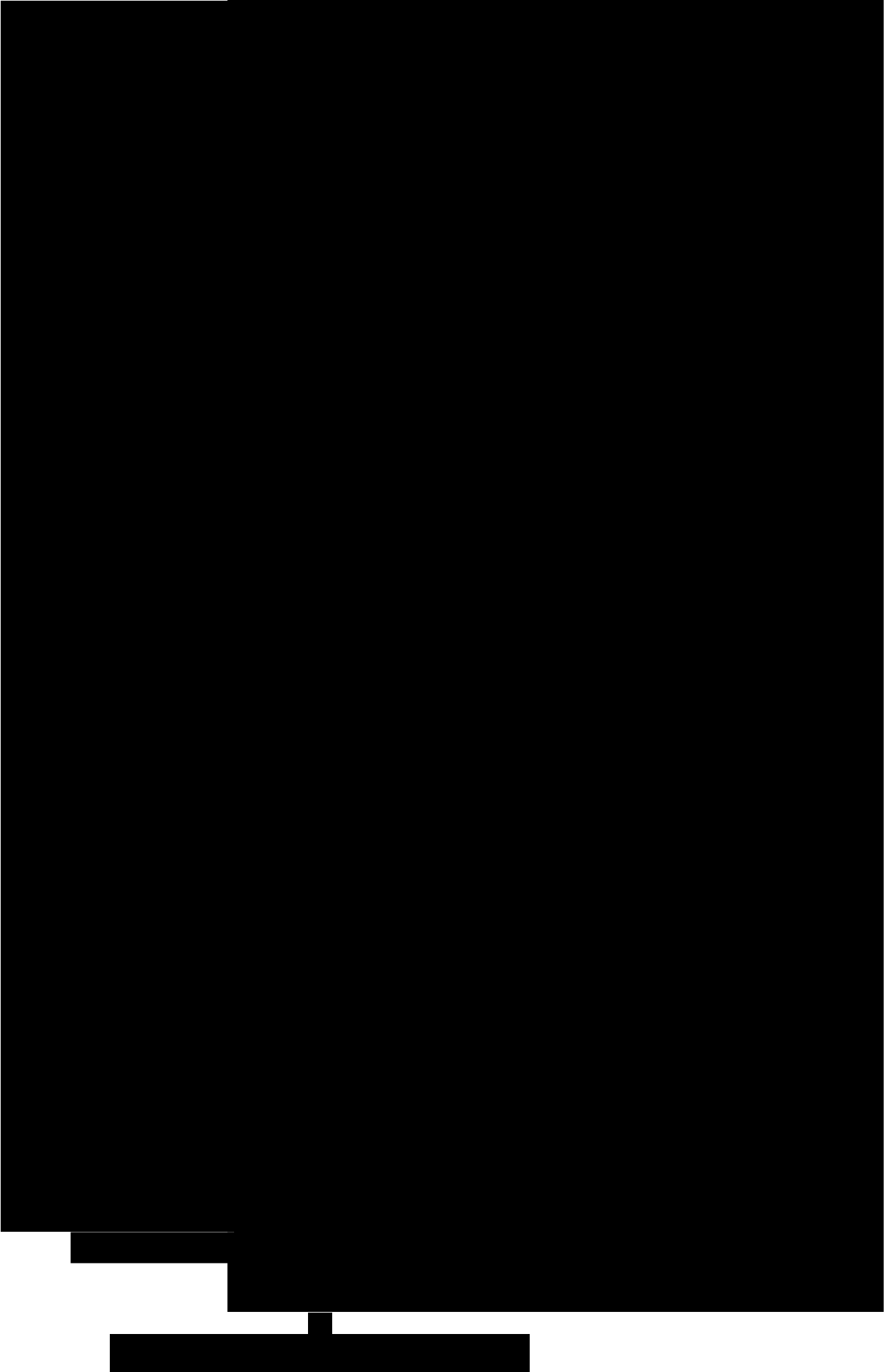












[REDACTED]

From:

Subject:

[REDACTED]

US v Khadr - Ruling - D-048 (Defense Motion - Motion to Compel Production of JTF GTMO SERE Interrogation SOP)

Attachments:

D-048 - Ruling Khadr.pdf

[REDACTED]

D-048 - Ruling
Khadr.pdf (16 K...

COL Brownback has directed that the attached materials be forwarded to counsel in US v Khadr and to other interested persons.

V/r,

[REDACTED]

Military Commissions Trial Judiciary
Department of Defense

[REDACTED]

To: [REDACTED]
Subj: [REDACTED]

[REDACTED]

Please forward the attached ruling in D-048 to the parties in the case of United States v. Khadr. Please furnish a copy to other interested persons.

COL Brownback

From:

Subject:

U.S. v. Khadr -- Defense Request to Supplement D-048

Attachments:

SERE - Vanity Fair SE
Article.pdf...

Sir,

1. D-048 is a defense Notice of Motion, informing the Commission of its intent to seek to compel production of the JTF SERE Manual.
2. The defense intends to offer the attached documents in support of D-048:
- a. Katherine Eban, The War on Terror: Rorschach and Awe, Vanity Fair, Jul. 17, 2007;
 - b. [REDACTED];
 - c. [REDACTED];
 - d. [REDACTED];
 - e. Selected pages from U.S. Army [REDACTED] Investigation into allegations of detainee abuse at Bagram (relating to S [REDACTED]).
3. The defense respectfully requests that the Military Judge consider the attached documents in connection with D-048.

 V/R

LCDR Kuebler

[REDACTED]

From:
Sent:
To:

[REDACTED]
Monday, April 21, 2008 4:18 PM

[REDACTED]

Subject:

[REDACTED]

RE: Filing Designation: D-048 - Notice of Motion to Compel Production (JTF GTMO SERE Interrogation SOP) - US v. Khadr

Signed By:

Attachments:

[REDACTED]

D-048 Gov't Response _SERE SOP_.pdf



D-048 Gov't
Response _SERE SOP

Sir,

Gov't response is attached.

V/R,

[REDACTED]

[REDACTED]

[REDACTED]

The filing designation for the 9 April 08 Defense Notice of Motion to Compel Production of the JTF GTMO SERE Interrogation SOP is D-048 Defense Notice of Motion to Compel Production (JTF GTMO SERE Interrogation SOP)- Khadr. See RC 5.3.

v/r,

[REDACTED]

Military Commissions Trial Judiciary

[REDACTED]

I am sending this attachment on behalf of Ms. Snyder and LCDR Kuebler for US v. Khadr. Please find attached the Defense Notice of Motion to Compel Production of the JTF GTMO SERE Interrogation SOP.

[REDACTED]

[REDACTED]

From: [REDACTED]

Sent: Monday, April 21, 2008 7:59 AM

To: [REDACTED]

Subject: FW: Request for extension to respond to D044 through D049 and D051 through D053

From: [REDACTED]

[REDACTED]

Subject: RE: Request for extension to respond to D044 through D049 and D051 through D053

Per COL Brownback, the government request for extension to respond to D044 through D049 and D051 through D053 is granted.

v/r,

[REDACTED]
Attorney Advisor
Military Commissions Trial Judiciary
Department of Defense

From: [REDACTED]

Sent: Monday, April 14, 2008 3:11 PM

To: [REDACTED]

Subject: Request for extension to respond to D044 through D049 and D051 through D053

Sir,

The Government respectfully requests until COB 21 April 2008 to respond to the subject filings.

V/R,

Jeff Groharing



[REDACTED]

From:
Sent:
To:

[REDACTED]
Wednesday, April 09, 2008 5:50 PM

[REDACTED]

Subject:

[REDACTED]

Filing Designation: D-048 – Notice of Motion to Compel Production (JTF GTMO SERE Interrogation SOP) - US v. Khadr

The filing designation for the 9 April 08 Defense Notice of Motion to Compel Production of the JTF GTMO SERE Interrogation SOP is D-048 Defense Notice of Motion to Compel Production (JTF GTMO SERE Interrogation SOP)- Khadr. See RC 5.3.

v/r,

[REDACTED]

Military Commissions Trial Judiciary

-----O

[REDACTED]

[REDACTED]

Subject: US v. Khadr – Defense Notice of Motion to Compel Production of the JTF GTMO SERE Interrogation SOP

[REDACTED],

I am sending this attachment on behalf of Ms. Snyder and LCDR Kuebler for US v. Khadr. Please find attached the Defense Notice of Motion to Compel Production of the JTF GTMO SERE Interrogation SOP.

SSG [REDACTED]

**UNITED STATES
OF
AMERICA**

D-053
**Defense Notice of Motion To Compel Production of
Document (Agent Notes)**

9 May 2008

v

OMAR AHMED KHADR
a/k/a "Akhbar Farhad"
a/k/a "Akhbar Farnad"
a/k/a "Ahmed Muhammed Khahi"

Ruling

1. The defense filed this notice of motion on 9 April 2008. The military judge has not at any time required that the defense provide a motion as contemplated by the Rules of Court. The government responded on 21 April 2008. Both parties argued on 8 May 2008.
2. The government, at argument, did not assert that there were no differences whatsoever between the agent notes sought by the defense and written summary of the interview on an official form. Nor did the government assert any reason for not producing the notes other than it felt the defense had not met its burden under RMC 701 and what the government believes to be the proper case law.
3. The commission notes that there have been instances brought forth in this commission in which the agent notes contained matters not contained in the written summary of the interview. Further, the commission notes that there is no burden asserted by the government in producing these notes. Further, the commission finds that the notes are material in that they would be helpful to the defense in preparing its case in general, and that they would be specifically helpful to the defense in preparing any possible suppression motion concerning statements allegedly made by Mr. Khadr.
4. The defense motion to compel production of the agent notes is granted.

Peter E. Brownback III
COL, JA, USA
Military Judge

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

**Notice of Defense Motion
To Compel Production of Documents
(Agent Notes)**

9 April 2008

1. **Timeliness:** This notice of motion is filed within the timeframe established by the Military Judge's 15 March 2008 e-mail order.

2. **Notice of motion:** On or about 11 April 2008, the defense shall move this Military Commission for an order directing the government to produce the following documents or materials:

a. Notes taken by [REDACTED] or other person, during any interview of LTC "W," including, without limitation, an interview conducted on or about 20 April 2004;

b. Notes of interviews of any person for whom a CITF Report of Investigative Activity or other summary has been provided to the defense in discovery in this case;

c. Notes of an interview of [REDACTED], conducted on [REDACTED] 2003.¹

3. **Summary of basis for motion:** This case involves acts alleged to have taken place on a battlefield in Afghanistan, almost six years ago. Memories have faded or been influenced by intervening events, such as conversations with other witnesses or by reading media accounts of the 27 July 2002 firefight. During his deposition last week, LTC W indicated on numerous occasions that he could not recall particular details of the 27 July 2002 firefight and attributed his difficulties to the passage of time. LTC W also indicated that various U.S. personnel have corresponded and communicated over the years about Mr. Khadr's case and have read and discussed press accounts relating to Mr. Khadr. Rather than taking sworn statements in the course of their investigation, CITF agents relied almost exclusively upon *summaries* of

¹ The defense specifically references this additional interview because it is unclear under what circumstances it was taken and for what purpose (i.e., whether it was taken as part of the CITF investigation in this case). Taken in April 2003, several months after the July 2002 firefight, but almost a year before the commencement of a series of interviews as part of what appears to be the formal CITF investigation into the offenses at issue in this case, the statement stands apart. After describing his understanding of the circumstances leading to Sgt. Speer's injury, Worth is asked if he has anything to add. He responds (curiously): "Yes, we gave them every chance to surrender, they had almost an hour before the airstrike to give up, and refused to do so." (Sworn statement of [REDACTED], dated [REDACTED] 2003, attachment A.)

interviews of material witnesses -- these summaries are presumably based, in turn, upon notes they took during the interviews. Indeed, LTC W confirmed that [REDACTED] (the CITF agent who interviewed LTC W on 20 April 2004) took notes during the interview. The difficulty of the task of reconstructing the events of 27 July 2002 is made more difficult by the fact that a majority of the witness interviews conducted in this case (17 of 28) took place *after* Mr. Khadr was initially charged in November 2005.² Given the absence of direct evidence of Mr. Khadr's guilt (with respect to Charge I), and the numerous conflicting accounts of the event, the slightest discrepancies or subtleties potentially missed by CITF interrogators in summarizing these interviews could be of tremendous importance. Accordingly, the unique circumstances of this case make these notes material to the preparation of the defense and their production should be ordered. The defense requested production of these materials on 3 April 2008, the day LTC W was deposed. (Defense Discovery Request of 3 April 2008.) The prosecution denied the defense request on 8 April 2008. (Government Response of 8 April 2008 to Defense Supplemental Discovery Request of 3 April 2008.)

4. **Oral Argument:** The defense requests oral argument as it is entitled to pursuant to R.M.C. 905(h) ("Upon request, either party is entitled to an R.M.C. 803 session to present oral argument or have evidentiary hearing concerning the disposition of written motions."). Oral argument will allow for a thorough consideration of the issues.

5. **Witnesses and evidence:** The defense does not anticipate the need to call witnesses in connection with this motion, but reserves the right to do so should the prosecution's response raise issues requiring rebuttal testimony. The defense relies on the following as evidence:

Attachment A

Defense Discovery Request of 3 April 2008 (Attachment A to Def. Notice of MTC Production of Documents Relating to Policies Regarding the Detention and Treatment of Minors filed 9 Apr 08)

Government Response of 8 April 2008 to Defense Supplemental Discovery Request of 3 April 2008 (Attachment B to Def. Notice of MTC Production of Documents Relating to Policies Regarding the Detention and Treatment of Minors filed 9 Apr 08)

6. **Certificate of conference:** The defense and prosecution have conferred. The prosecution objects to the relief requested.

7. **Additional Information:** In making this motion, or any other motion, Mr. Khadr does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this Military Commission to charge him, try him, and/or adjudicate any aspect of his conduct or detention.

² If interviews conducted within a matter of just days before Mr. Khadr was formally charged are considered as well (presumably well after the actual decision to charge had been made by the Chief Prosecutor) the number increases. Indeed, the interview of LT [REDACTED] (the officer who made the diary entry referenced in the Defense Request to Depose LTC W (D-028), was apparently not interviewed by CITF until 28 October 2005 -- his diary being provided to the government then or sometime thereafter.

Nor does he waive his rights to pursue any and all of his rights and remedies in and all appropriate forms.

8. Attachment:

A. Sworn statement of Specialist [REDACTED] [REDACTED] 2003

/s/

William C. Kuebler
LCDR, JAGC, USN
Detailed Defense Counsel

Rebecca S. Snyder
Assistant Detailed Defense Counsel

SWORN STATEMENT

For use of this form, see AR 190-45: The proponent agency of the Deputy Chief of S [REDACTED] onnel.

LOCATION [REDACTED]	DATE [REDACTED]	TIME 1018	NUMBER [REDACTED]
LAST NAME, FIRST NAME, MIDDLE NAME [REDACTED]	SOCIAL SECURITY NUMBER [REDACTED]	GRADE/STATUS [REDACTED]	
ORGANIZATION OR ADDRESS [REDACTED]			

I, [REDACTED] want to make the following statement under oath:

[REDACTED]

EXHIBIT	INITIALS OF PERSON MAKING STATEMENT [REDACTED]	PAGE 1 OF ³ / 2 PAGES
---------	---	---

ADDITIONAL PAGES MUST CONTAIN THE HEADING "STATEMENT OF [REDACTED] TAKEN AT [REDACTED] DATED [REDACTED] THE BOTTOM OF EACH
ADDITIONAL PAGE MUST BEAR THE INITIALS OF THE PERSON MAKING THE STATEMENT AND BE INITIALED AS "PAGE _ OF _ PAGES."
WHEN ADDITIONAL PAGES ARE UTILIZED, THE BACK OF PAGE 1 WILL BE LINED OUT, AND THE STATEMENT WILL BE CONCLUDED ON THE
REVERSE OF ANOTHER COPY OF THIS FORM.

STATEMENT OF [REDACTED] TAKEN AT [REDACTED] DATED 2-2- [REDACTED] (CONTINUED)

INITIALS OF PERSON MAKING STATEMENT [REDACTED]

[REDACTED]

I, [REDACTED] AFFIDAVIT
[REDACTED] HAVE READ OR HAVE HAD READ TO ME THIS STATEMENT WHICH
BEGINS ON PAGE [REDACTED] AND ENDS ON PAGE [REDACTED]. I HAVE FULLY UNDERSTAND THE CONTENTS OF THE ENTIRE STATEMENT MADE BY ME.
THE STATEMENT IS TRUE. I HAVE INITIALED ALL CORRECTIONS AND HAVE INITIALED [REDACTED] PAGE CONTAINING
THE STATEMENT. I HAVE MADE THIS STATEMENT FREELY WITHOUT HOPE OF BENEFIT OR WITHOUT THREAT OR
PUNISHMENT, AND WITHOUT COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL [REDACTED]

WITNESSES:

ORGANIZATION OR ADDRESS

ORGANIZATION OR ADDRESS

[REDACTED] (Signature of Person Administering Oath)
SUBSCRIBED AND SWORN BEFORE ME, A PERSON BY LAW
TO ADMINISTER OATHS, THIS [REDACTED]
AT [REDACTED]

[REDACTED] (Signature of Person Administering Oath)

[REDACTED] (Authority to Administer Oath)

INITIALS OF PERSON MAKING STATEMENT [REDACTED]

PAGES [REDACTED] OF [REDACTED] PAGES

UNITED STATES OF AMERICA

v.

**OMAR AHMED KHADR
a/k/a "Akhbar Farhad"
a/k/a "Akhbar Farnad"
a/k/a "Ahmed Muhammed Khali"**

D053

GOVERNMENT'S RESPONSE

**To the
Defense Notice of Motion to Compel
Production of Documents (Agent Notes)**

21 April 2008

1. **Timeliness:** This motion is filed within the timelines established by Military Commissions Trial Judiciary Rule of Court 3(6)(b) and the Military Judge's e-mail of 14 April 2008.

2. **Relief Requested:**

a. The Government notes that the Defense has not formally motioned the Court to produce the documents referenced in their "Notice of Motion to Compel Production of Documents (Agent Notes)." In the event the Defense ultimately files such a motion on this issue, the Government respectfully requests the opportunity to respond.

b. Moreover, the Government respectfully requests that the Military Judge require the Defense to submit all motions for appropriate relief in writing as required by Military Commissions Trial Judiciary Rule of Court 3.3. RC 3.3 requires parties to file motions in writing unless they lack sufficient time to file a written motion. In the present case, the Defense has had ample time to file written motions regarding this specific discovery issue. Allowing parties to make such informal notices, as well as relying on incomplete arguments prepared without an appropriate amount of time will likely require the Military Judge to issue rulings while not being fully briefed on the relevant facts and law on a particular matter. All parties would benefit from following the formalized motions practice articulated in Rule 3 of the Rules of Court.

c. Nevertheless, the Government does cite relevant United State Court of Appeals Circuit case law making clear that production of agent preparatory rough notes is not required when the Government produces to the Defense the final investigative report that provides all the same information contained in the agent's rough notes used to create the final document and there is no inconsistencies between the rough notes and the final investigative report.

3. **Burden and Persuasion:** Assuming the Defense ultimately moves for the requested relief, as the moving party, the Defense would bear the burden of establishing, by a preponderance of the evidence, that it is entitled to the requested relief. See Rules for Military Commissions ("RMC") 905(c)(1), 905(c)(2)(A).

4. **Facts:**

- a. All relevant facts are contained in the discussion.

5. **Discussion:**

a. PRODUCTION OF THE MATERIAL SOUGHT BY THE DEFENSE IS NOT REQUIRED UNDER THE MILITARY COMMISSIONS ACT OR MANUAL FOR MILITARY COMMISSIONS AND IS COUNTER TO FEDERAL PRECEDENT.

i. The Defense Notice of Motion to Compel Production of Documents (Agent Notes) seeks to have this Commission order the Government to produce preparatory rough agent notes “taken by [REDACTED], analyst Q.S., or other persons during any interview of LTC ‘W,’ including without limitation, an interview conducted on or about 20 April 2004” as well as corresponding agent rough notes for all Criminal Investigation Task Force (CITF) reports provided to the Defense and CITF rough notes for [REDACTED] conducted on 4 April 2003. The Defense cites no authority by way of a case citation or any applicable rule for this request, but merely asserts that “the unique circumstances of this case make these notes material to the preparation of the [D]efense and their production should be ordered.” (Notice of Defense Motion, page 2).

ii. Pursuant to R.M.C. 701 and applicable case law, the Government is obliged to disclose anything in its possession—including any agent’s rough notes of an interview with a witness or defendant- that is either “material to the preparation of the defense” or exculpatory.

iii. Federal case law makes clear that such production is not required, provided that a complete investigative report is given to the Defense and this report is available to the Defense when conducting cross examination of the agent who authored the report. Moreover, in the present case, Government prosecutors have carefully reviewed the agent rough notes that correspond with the produced CITF Form 40s and can represent that there are no inconsistencies between the CITF Form 40s provided and the rough interview notes.

iv. In the case of *United States v. Coe*, 220 F.3d 573, 583 (7th Cir. 2000) the Circuit Court held that the District Court did not abuse its discretion in refusing to order the disclosure of handwritten interview notes where the government had disclosed a type-written report that accurately summarized the notes. In *Coe*, the Seventh Circuit affirmed the trial court’s decision denying production of rough notes of an interview in which the Government provided the Defense the final investigative report, that is, an FBI 302, which is the exact investigative equivalent of a CITF Form 40. The Seventh Circuit held that a criminal defendant is not entitled to an agent’s notes if the agent’s report contains all that was in the original notes. The Seventh Circuit further noted that the District Court found no inconsistencies between the FBI 302 and the FBI interview notes themselves

and that the defendant had access to the FBI 302s for use in cross-examination. See also *United States v. Muhammad*, 120 F.3d 688, 699 (7th Cir. 1997)

v. In *United States v. Martin*, 565 F.2d 362, 364 (5th Cir. 1978) the Circuit Court held that an FBI agent's notes of an interview of the defendant are not *Brady* material, absent some independent showing that they contain evidence that is material to guilt or punishment.

vi. Although not argued by the Defense, the agent's rough notes are not subject to disclosure as Jencks Act, 18 U.S.C. §3500, material. As the Eleventh Circuit has written,

[n]o decision of this Circuit ... indicates that either rough notes or the rough draft of a report prepared by a government agent becomes Jencks Act material merely because the agent uses them to prepare his final report. Indeed, the case law is directly contrary to such a proposition.

United States v. Soto, 711 F.2d 1558, 1562 & n.8 (11th Cir. 1983); see also *United States v. Ramirez*, 954 F.2d 1035, 1038 (5th Cir. 1992) ("We find that the scattered notes taken by Bryant over the course of the investigation do not fit within the [Jencks] Act's purview."); *United States v. Martin*, 565 F.2d 362, 363-364 (5th Cir. 1978); *United States v. Cole*, 634 F.2d 866, 868-869 (5th Cir. 1981) (discussing *Martin* in context of *Brady* as well as Jencks Act); *United States v. Koskerides*, 877 F.2d 1129, 1133-34 (2nd Cir. 1989).

vii. Since the the Defense provides no rule, statute or case for its request, the Government presumes Khadr's assertion rests under R.M.C. 701 or the Jencks Act for production of preparatory rough interview notes. Such a request should be rejected as not required under these facts under R.C.M. 701 or the Jencks Act. Preparatory rough notes are not always, as Khadr argues, "material" to the Defense. Rather, the Government urges that the Commission find that the Government fulfills the requirements of R.M.C. 701 when it discloses to the defendant a CITF Form 40 report that accurately reflects the contents of the interviewer's rough notes. In such cases, the notes are not "material to the preparation of the Defense" since all of the discoverable material is contained within the CITF Form 40 itself. Moreover, the Government has undertaken its responsibility to carefully review the agent rough notes and compare them with the final investigative reports and represents that there are no inconsistencies between the notes and the investigative report.

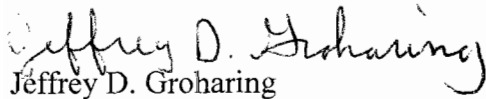
viii. For the reasons above and for the same reasons stated in the Government response to D044, this request should also be denied.

b. CONCLUSION

The evidence sought by the accused is not relevant, material, or exculpatory; therefore Khadr has no right to it under the MCA or MMC. The Defense cites no law, and indeed failed to cite relevant Federal law, requiring production of preparatory rough notes. The Government has provided the Defense with all CITF reports related to the

interviews at issue. Additionally, in the case of LTC "W" the defense has conducted a four hour long, transcript-documented deposition of this witness and this witness will also be called as a government witness at trial. The Defense request for rough notes for this witness and all witnesses in its "Notice of Motion" should be denied.

6. **Oral Argument:** This request should be denied without argument.
7. **Witnesses and Evidence:** All of the evidence and testimony necessary to deny this motion is already in the record.
8. **Certificate of Conference:** Not applicable.
9. **Additional Information:** None.
10. **Submitted by:**


Jeffrey D. Groharing
Major, U.S. Marine Corps
Prosecutor

Keith A. Petty
Captain, U.S. Army
Assistant Prosecutor

John F. Murphy
Assistant Prosecutor
Assistant U.S. Attorney

Friday, May 09, 2008 6:24 PM

US v Khadr - Ruling - D-053 (Defense Notice of Motion to Compel Production of Documents
- Agent Notes)

D-053 Ruling - Khadr.pdf

COL Brownback has directed that the attached materials be forwarded to counsel in US v Khadr and to other interested persons.

_____O

THCOM JTFGTMO

Please forward the attached ruling in D-053 to the parties in the case of United States v. Khadr. Please furnish a copy to other interested persons.

COL Brownback

[REDACTED]

From: [REDACTED]

Monday, April 21, 2008 3:34 PM

To: [REDACTED]

[REDACTED]

Attachments:

D053 - Gov't Response.pdf



D053 - Gov't
Response.pdf

Sir,

Gov't response is attached.

V/R,

[REDACTED]rine Corps

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

$v/r,$

Military Commissions Trial Judiciary

I am sending this attachment on behalf of Ms. Snyder and LCDR Kuebler for US v. Khadr. Please find attached the Defense Notice of MTC Production of Docs (Agent Notes).

[REDACTED]

From: [REDACTED]
Sent: Monday, April 21, 2008 7:59 AM
To: [REDACTED]
Subject: FW: Request for extension to respond to D044 through D049 and D051 through D053

From: [REDACTED]
Sent: Monday, April 14, 2008 3:22 PM
To: [REDACTED],
CPT, [REDACTED]
Cc: [REDACTED]
[REDACTED]
[REDACTED]
Subject: RE: Request for extension to respond to D044 through D049 and D051 through D053

Per COL Brownback, the government request for extension to respond to D044 through D049 and D051 through D053 is granted.

v/r,

[REDACTED]
[Attorney Advisor](#)
[Military Commissions Trial Judiciary](#)
[Department of Defense](#)

From: [REDACTED]
[REDACTED]
To: [REDACTED]
Cc: [REDACTED]
[REDACTED]
[REDACTED]
Subject: Request for extension to respond to D044 through D049 and D051 through D053

Sir,

The Government respectfully requests until COB 21 April 2008 to respond to the subject filings.

V/R,

Jeff Groharing



[REDACTED]

From: [REDACTED]

Sent: Thursday, April 10, 2008 9:29 PM

To: [REDACTED]

Subject: Filing Designation: D-053 Notice of Motion to Compel (Agent Notes) - US v. Khadr

The filing designation for the 9 April 08 Defense Notice of MTC Production of Docs (Agent Notes) is D-053 Notice of Motion to Compel (Agent Notes) - Khadr. See RC 5.3.

v/r,

[REDACTED]

Military Commissions Trial Judiciary

[REDACTED]

[REDACTED],

I am sending this attachment on behalf of Ms. Snyder and LCDR Kuebler for US v. Khadr. Please find attached the Defense Notice of MTC Production of Docs (Agent Notes).

[REDACTED]